Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1714

ROBERT M. POSTAL
SALEM M. FORSYTHE
GEORGE A. CHITTY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR S. MEISNERE
1707 L Street, N.W.
Suite 560
Washington, D.C. 20036
(202) 296-0993

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To: The Honorable Chief Justice and the Associate Justices of the United States Supreme Court.

Robert H. Postal, Salem L. Forsythe, and George A. Chitty, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 15, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 589 F.2d 862. The District Court entered judgment without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1979 and this petition has been filed within ninety (90) days. Though not filed within 30 days as required by Rule 22(2), this is not a jurisdictional defect. *Heflin* v. *United States,* 358 U.S. 415, 418n.7 (1959). Counsel was not retained until the thirty days expired. Because of the important constitutional questions at issue and to avoid "wasteful circuty" *Heflin* supra, this Court should dispense with the Rule and accept jurisdiction.

QUESTIONS PRESENTED

1. Whether a Coast Guard violation of a Treaty entered into by the United States acts to bar jurisdiction of the United States Courts over acts discovered in violation of said Treaty?

2. Whether Article 6 of the Convention on the High Seas is self-executing, thus limiting jurisdiction of the United States Courts over acts that occur on the High Seas.

3. Whether the Coast Guard has the Constitutional authority to seize a foreign vessel on the high seas.

4. Whether the Coast Guard had a reasonable suspicion that the LaRosa was not a properly registered vessel.

PROVISIONS INVOLVED

The provisions involved are Article VI of the United States Constitution, the Fourth Amendment to the United States Constitution, the Convention on the High Seas, and 14 USC § 89. They are printed in Appendix B.

STATEMENT OF THE CASE

The Defendants were convicted of conspiracy to import marijuana into the United States in violation of 21 U.S.C. § 963 (1976), and of conspiring to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846 (1976). These convictions were affirmed by the Fifth Circuit Court of Appeals 589 F.2d 862 (1979).

The events in question began on the morning of September 15, 1976 when the Coast Guard Cutter *Cape York* first sighted the defendant's vessel *LaRosa* at a point approximately 8.5 miles southeast of Upper Matecumbe Key, the nearest of the Florida keys. When *LaRosa* was approximately 10.5 miles from the coast, a Coast Guard officer boarded *LaRosa* to determine its nationality and see that its identification papers were in order. Having determined that *LaRosa* was a vessel registered by the Grand Cayman Government, the officer returned to the *Cape York*.

Lt. Beardsworth, the customs officer, conferred with the Operations Center in Miami, and eventually decided to board the *LaRosa* and conduct a customs search. The second boarding occurred some two and one half to three hours after the first boarding and was done by a show of force. By this time the *LaRosa's* course had taken her outside the twelve mile limit, perhaps some

16.3 miles from the nearest United States coastline. The Coast Guard had taken no radar fix at the time of the second boarding. However, the Government stipulated that the second boarding took place beyond the twelve mile limit. *United States* v. *Postal,* 589 F.2d 862, 867 n.6 (5th Cir. 1979).

During the second boarding, Coast Guard Officers interrogated the defendants and engaged in a thorough search of the *LaRosa.* Contraband was discovered, the defendants were arrested, and the *LaRosa* was taken in tow.

No evidence was ever offered to prove that the crew on the *LaRosa* were American citizens and it was very clear that the *LaRosa* was a properly registered vessel of the Grand Cayman Islands.

REASONS FOR GRANTING THIS WRIT

I. Introduction

The power and authority of the Coast Guard to board foreign vessels in international waters, conduct a search and arrest the crew members is one which has troubled the Courts of this country for several years and on which this Court has as yet, expressed no opinion. The problem necessarily involves interpretation of the United States Constitution, international treaties and their interrelationship. "Like the seas where the vessel was boarded, the problem is deep and shark-infested. Unlike them, the answer is not clearly charted." *United States* v. *Cadena,* 585 F.2d 1252, 1255 (5th Cir. 1978).

The crucial question is whether the United States Courts have jurisdiction over persons arrested in violation of an international treaty which the United

States and the foreign country are parties. The Court of Appeals below ruled that the controlling question was whether Article VI of the Convention on High Seas if self-executing. "The self-executing question is perhaps one of the most confoundary in treaty law", *United States* v. *Postal,* 585 F.2d 863, 876 (5th Cir. 1979). This question is also one which this Court has not ruled on, and has ramifications world-wide.

The Court of Appeals decision, in effect overrules this Court's decision in *Cook* v. *United States,* 288 U.S. 102 (1933). The principle underlying the Cook decision is exactly on point with the case at bar. The only difference is the substance involved. To the generation of the Prohibition era, it was alcohol; to the generation of the Seventies is it canabis.

II. Article 6 of the Convention of the High Seas Is Clearly Self-Executing and Thus Limits Jurisdiction of the United States Courts Over Acts That Occur on the High Seas

International Treaties in the United States may be either self-executing or executory. If self-executing, no legislative execution is necessary to make the terms of the treaty binding on the Courts of the United States. If executory, legislative execution is required for the treaty to take effect. *Foster* v. *Neilson,* 27 U.S. (2 Pet.) 253 (1829). Treaties may be partially self-executing and partially executory. *Aquilar* v. *Standard Oil Co.,* 318 U.S. 724, 738 (1943). *See also,* United Nations Charter.

As the Court of Appeals below indicated, the Convention on the High Seas has several sections which are clearly executory. Articles 27, 28 and 29 begin with the preamble "Every State shall take the necessary legis-

lative measures to. . . ." (See, Appendix B for full text). In addition Articles 10, 12, 13 also require legislative enactments. (See Appendix B).

At the same time several other Articles are clearly self-executing. Article 19 gives a state jurisdiction over any pirate ship it may seize on the high seas. Article 8 gives warships on the high seas complete immunity from the jurisdiction of any state other than the flag state.

How then, is Artcile 6 to be interpreted? Its pertinent parts read as follows:

> Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.

The basic criterion for interpretation of international agreements is that words be read in the ordinary meaning of the words of the agreement in the context in which they are used. *Restatement (Second) of Foreign Relations Law of the United States,* § 147(1)(a) (1965). Examining Article 6, there is no rational interpretation which can result in Article 6 being executory. There is no provision at the beginning of Article 6 like those in articles 27, 28 and 29 which would make it, *ipso facto* a non-self executing section. Rather Article 6 is more akin to the self-executing sections. It says "Ships *shall* sail . . . [and] *shall* be subject to its [home nation's] exclusive jurisdiction. This is an unequivocal statement of the duties of vessels and their sovereign's authority. In fact, Article 6, contains the only two exceptions to this exclusive jurisdiction—other international treaties or other articles in the Convention on

the High Seas. The Court of Appeals specifically held other sections of the Convention inapplicable because the arrest in question was a foreign, private vessel and not a merchant ship. The Court also cited no other international treaties which would authorize jurisdiction by the United States over foreign vessels on the high seas.

Because the Convention on the High Seas specifically stated in some provisions that further legislative action was necessary, the logical inference is that all other sections should be self-executing. To construe the statute any other way is to distort the "ordinary meaning of the words of the agreement in the context in which they are used." *Restatement (Second) of Foreign Relations Law of the United States,* § 147(1)(a) (1965).

In fact, Article 6 has been declared by the Fifth Circuit to be self-executing. In *United States* v. *One (1) 43 Foot Sailing Vessel,* 405 F.Supp. 879, 882 (S.D. Fla. 1975), District Judge Atkins stated:

> On the High seas, *only the vessels of the United States Government may exercise jurisdiction over United States flag vessels.* Article 6 C.H.S. Since no nation may exercise sovereignty over the waters of the high seas, Article 1 C.H.S. the maintenance of public order on the world's oceans depends upon *effective control in accordance with their treaty obligations by the nations of the world over vessels flying their flag.* (emphasis added)

This clearly is a ruling that Article 6 of the Convention on the High Seas is self-executing. Otherwise, it would not be a "treaty obligation" nor would only the United States have jurisdiction over United States flag

vessels. This opinion was adopted by the Court of Appeals at 538 F.2d 694 (5th Cir. 1975). Further, in *United States* v. *Petrulla,* 457 F.Supp. 1367, 1371 (M.D. FLA. 1978) Judge Carr ruled the basic premise underlying Article 5 and 6 of the Convention on the High Seas was that

> in order to maintain the freedom of the seas each nation must provide registration so that it can exercise control and supervision over its vessels. Upon registration in a particular nation, the vessel bearing documentation of that registration can *only* be boarded by that nation or upon permission from that nation except if the vessel is in the territorial waters of another nation.

These two opinions are in direct conflict with that of the Court of Appeals below. For the United States to argue that it had exclusive jurisdiction of all American vessels on the high seas citing Article 6 thus precluding other nations from boarding American vessels and then to argue that Article 6 was not self-executing and the United States has the authority to board foreign vessels on the high seas is wholly inconsistent and if ruled the law of the land by this Court would bring international repercussions. If this decision is allowed to stand, it would authorize boarding of United States Ships by other nations. No one would seriously contend that an Idi Amin or the Soviet Union has under the Convention of the High Seas the absolute right to board foreign vessels (in this case, United States vessels) on the high seas, search and then arrest the crew if it finds a violation of its internal laws, and try the United States citizens under the law and in the courts of the foreign country.

The reason for this

> is of course for the law of nations, the requirements of world society, and the integrity and independence of other nations; . . . we can better demand in the international court of public opinion similar respect for our sovereign integrity if we extend such respect to others. *United States* v. *Lira,* 515 F.2d 68, 72-73 (2d Cir. 1975) (concurring opinion)

Violating international treaties as in this case, will go a long way toward ending respect for the United States on the high seas, rather than improving an already tarnished reputation overseas.

Another means of interpreting international treaties is to examine the legislative history of the ratification and other documents made at the time of drafting of the Convention. *Diggs* v. *Richardson,* 555 F.2d 848, 851 (D.C. Cir. 1976); *People of Saipan* v. *United States Department of Interior,* 502 F.2d 90, 97 (9th Cir. 1974) *cert. denied* 420 U.S. 1003 (1975). Neither the Senate Committee Report nor the debate on ratification contained any reference to the status of Article 6. *See, Congressional Record,* May 26, 1960, p.1172, et seq.

However, during the drafting stage, the United States submitted a proposal attempting to clarify Article 6. Comment (c) read:

> *Jurisdiction and control.* Article [6], in stating that . . . ships "*shall* be subject to its [the Flag State's] exclusive jurisdiction on the high seas: is intended to mean that ships "shall be subject to the exclusive jurisdiction of the State of their nationality while on the high seas. *United States Document* H. Conf. 13/c.2/2.41.

What clearer indication can this be, that the United States does not have jurisdiction over any foreign vessels on the high seas. To hold otherwise would make United States vessels fair game on the high seas to be seized by any other country.

III. A Coast Guard Violation of a Treaty Entered Into by the United States Acts To Bar Jurisdiction of the United States Courts Over Acts Discovered in Violation of That Treaty

The Court of Appeals legal gymnastics to escape its reluctant, but correct decision that there was indeed a violation of an international treaty, was an attempt to overrule this Court's decision in *Cook* v. *United States,* 288 U.S. 102 (1933) which held that treaties may act to deprive the United States, and hence its Courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction. "To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty." *Id.* at 121-22. See also *Ford* v. *United States,* 273 U.S. 593, (1927); *United States* v. *Schouweiler,* 19 F.2d 387 (S.D. Cal. 1927); and *United States* v. *Ferris,* 19 F.2d 925 (N.D. Cal. 1927).

These cases construed a treaty between the United States and Britain during Prohibition limiting United States jurisdiction over British vessels to that distance that could be traveled in an hour's sailing from the coast of the United States. Seizures outside this limit violated the treaty and deprived the United States Courts of Jurisdiction. This Court had no problem holding the relevant points of this treaty self-executing even though that was not the practice in the United Kingdom. This diminishes the Court of Appeals' concern at p. 878.

The Court of Appeals was also very concerned with the lack of attention given to Article 6:

> Had the United States interpreted the International Law Commissions draft article as a limitation of its jurisdiction to that expressly conferred by treaty, we think that considerable more attention would have been directed to the Article, for a self-executing interpretation would severely curtail the traditional practice of the United States in exercising jurisdiction on the high seas in the absence of treaty [sic] as evidenced by substantial legislation designed to enforce customs regulations there. *United States* v. *Postal,* 589 F.2d 862, 878 (5th Cir. 1979).

This concern however is misplaced, and really completely consistent with Article 6. Petitioners do not contend that the United States does not have jurisdiction over American vessels on the high seas. That is exactly what Article 6 states. What Petitioners do find objectionable is attempted control by the United States over foreign vessels on the high seas. No one would seriously contend that the United States has the authority in its domestic law to assume jurisdiction over foreign vessels on the high seas. The international consequences would be unfavorable, to say the least. No country may assert sovereignty over the high seas. *United States* v. *Warren,* 578 F.2 1058, 1065 n.4 (5th Cir. 1978).

IV. The Coast Guard Does Not Have Constitutional or Statutory Authority To Seize Foreign Pleasure Craft on the High Seas

The petitioners contend that the Coast Guard lacks constitutional and statutory authority to act against foreign vessels on the high seas beyond the twelve mile

limit. The Court of Appeals cites *United States* v. *Cadena,* 585 F.2d 1252 (5th Cir. 1978) for the proposition that seizure of a foreign vessel and arrest of the crew some 200 miles at sea did not exceed the statutory authority of the Coast Guard. The analogy is not quite so simple. As the Court points out at note 8, *In Cadena* the ship in question was a freighter of Canadian registry. Canada had not ratified the Convention on the High Seas and the Court ruled that the provisions of the treaty were unavailable to the defendants. Thus the authority of the Coast Guard in light of the Convention on the High Seas has never been addressed.

The Court of Appeals also found *United States* v. *Warren,* 578 F.2d 1658 (5th Cir. 1978) controlling in support of the seizure of the *LaRosa.* However, *Warren* dealt only with U.S. ships on the high seas and thus is distinguishable.

V. The Coast Guard Did Not Have a Reasonable Suspicion That the LaRosa Was Not a Properly Registered Vessel

The Court below used the first boarding as a stepping stone to justify the second boarding some three hours later. However by the time of the second boarding the *LaRosa* was outside the 12 mile limit. Whether probable cause found on a documentary search inside the 12 mile limit will support a full-fledged search three hours later on the high seas is a question this Court has never answered. In addition, the case at bar clearly deals with a private vessel, not a merchant vessel as in all other cases in this area. The fourth amendment ramifications of these problems deserve the attention of this Court. Judge Fay expressed the fourth amendment concerns in his dissent in *United States* v. *Warren:*

> The majority apparently is willing to give the Coast Guard unfetted discretion to seize American vessels on the high seas even though we must be aware of the fact that the Supreme Court has said that such a grant of discretion to a Border Patrol officer on a roving patrol would be unconstitutional. *Warren,* supra at 1080.

In addition, in this term this Court has ruled that police may not make random automobile stops to check for proper documentation and then engage in a more thorough search. *Delaware* v. *Prouse No. 77-1571.* The analogy to a private boat is very apt and consideration by this Court of the Coast Guard's right to make such stops of foreign pleasure vessels is warranted.

This Court has also recently held that random stops by roving border patrols in areas near international borders is illegal. *United States* v. *Brignoni—Ponce,* 422 U.S. 543 (1976).

> Except at the border and its functional equivalents, officers on roving patrols may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. *Id.* at 884 (footnote omitted).

While the authority of Customs to board vessels is set out by statute more so than for the border patrol, the distinction between commercial and pleasure craft is not clearly laid out. As the Court of Appeals properly acknowledged, the Convention on the High Seas in Article 22, provided that the boarding of a foreign merchant ship is not justified unless there is reasonable suspicion that the ship is engaged in piracy, the slave trade, or is the same nationality of the warship. The

Convention does not expressly address the situation of the boarding of foreign private *pleasure* craft, which the *LaRosa* was.

The Court of Appeals, *a fortiori* assumes that justifications for boarding a merchant vessel would apply to a pleasure craft. In light of this Court's recent ruling in *Prouse,* this conclusion must be suspect.

> As *Terry* v. *Ohio* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. *Prouse,* 47 Law Week 4327 (1979).

Petitioners fail to see a difference between a person's car and a person's boat or between a border search and a customs search. This Court stated in *Prouse,* that an "at least articulable and reasonable suspicion was necessary to stop an automobile. When the decision was made to board the *LaRosa* for the first time in the case at bar, the Coast Guard did not have a reasonable suspicion of any violation. When asked to show a flag, the crew of the *LaRosa* exhibited a Grand Cayman flag and Postal stated that the *LaRosa* was of Grand Caymen registry. The Grand Caymen flag is very distinctive, and not easily misidentified. The proper means of identifying a ship's nationality was recently elaborated on in *United States* v. *Petrulla,* 457 F.Supp. 1367, 1372 (M.D. Fla. 1978):

> In order for the Coast Guard to determine whether it has jurisdiction it must ascertain whether the vessel is of American registry. This inquiry can in a normal instance be determined *without the necessity of boarding* by inquiring of the vessel and

> verification of the information with the nation of registry. If the information from the vessel is not verified by the nation of registry and there then becomes a genuine question of registry of the vessel, 14 U.S.C. § 89 would permit the United States Coast Guard to board the vessel and determine whether it was in reality a United States vessel.

As the Court of Appeals notes at 866, Lt. Beardsworth called the Coast Guard Headquarters Operations Center in Miami, Florida. He should have, but failed, to request the people in Miami to verify the information he had received. If he had done so, he would have found that the vessel was indeed properly registered in the Grand Caymens. There then would have been no possible reason for boarding the *LaRosa.* This failure, in addition to the failure by the Coast Guard to take a reading to determine their location before the second boarding shows a callous disregard for basic customs policies. Such behavior should not be the basis for searches under the Fourth Amendment.

Implicit also, in the excerpt from *Petrulla,* supra, are two limiting concepts. First, if the Coast Guard must ascertain whether the vessel is of American registry to determine if it has jurisdiction over the vessel, the logical inference is that should the vessel be of foreign registry, the Coast Guard has no jurisdiction over the vessel. Similarly, if a genuine question of registry triggers a 14 U.S.C. § 89 boarding, then where there is no genuine question of registry, there is no authorization pursuant to 14 U.S.C. § 89 to board a vessel. This eliminates the statutory basis for Coast Guard boardings of properly identified foreign vessels. The Coast Guard should not be able to evade this requirement by simply failing to make the proper inquiries.

These factors all lead to the conclusion that the Coast Guard did not in fact have a valid reason for boarding the *LaRosa* the first time. The other factors which the Court points out at 866 to support the first boarding were all factors which arose subsequent to the decision to board and thus could not have been factors in the initial decision. Thus, even if the treaty provision should be deemed executory, there was still no reasonable suspicion for the 1st boarding which was the touchstone for all subsequent events.

VI. In Trying To Overcome Serious Problems We Cannot Overlook Basic Constitutional Rights

The ruling by the Court of Appeals in effect says the United States has the power to board any foreign ship, merchant or pleasure craft, and search it for violations of United States laws. This carries the decision of the Fifth Circuit in *United States* v. *Warren,* 578 F.2d 1058 (5th Cir. 1978) one step further. As Judge Fay expressed in his thoughtful dissent in *Warren,* at 1086:

> The drug problem in this country is extremely serious. We need the most forceful prosecutions possible. However, we cannot ignore the basic rights which have allowed our way of life to continue some 200 years. We cannot and must not say 'the end justifies the means' at the expense of our constitutional rights. Few of these rights are more treasured than those protected by the Fourth Amendment.

And later at p. 1091:

> History has proven over and over that if we are to retain the basic freedoms that make us unique, we must never lose sight of the importance of preserving our basic constitutional rights.

CONCLUSION

For all of the above reasons, this petition for a writ of certiorari should be granted.

ARTHUR S. MEISNERE
1707 L Street, N.W.
Suite 560
Washington, D.C. 20036
(202) 296-0993

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 77-5354

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert Morris POSTAL, Salem L. Forsythe, and George A. Chitty, Defendants-Appellants.

February 15, 1979

Before WISDOM, TJOFLAT and VANCE, Circuit Judges.

TJOFLAT, Circuit Judge:

This case presents a consequential issue of international and domestic law that has been noted in this circuit but not yet authoritatively decided: whether a court of the United States can assert jurisdiction over persons arrested aboard a foreign vessel seized beyond the twelve-mile limit in violation of a particular provision of a treaty to which the United States and the foreign country are parties.[1] We hold that such a violation does not divest the court of jurisdiction over the defendants.

The defendants in this case were convicted in a joint bench trial of conspiring to import marijuana into the United States, in violation of 21 U.S.C. § 963 (1976), and of

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[1] The question was explicitly reserved in *United States v. Winter*, 509 F.2d 975, 983-84 & n.30 (5th Cir.), *cert. denied sub nom. Parks v. United States*, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975) and not directly posed in *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (vessel registered to non-ratifying country), or *United States v. Cortes*, 588 F.2d 106 (5th Cir. 1979) (stateless vessel). See note 8 *infra*. See also *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc) (search of United States vessel on the high seas).

conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 (1976). In addition to questioning the jurisdiction of the district court over their persons, the defendants, all of whom appeal, make numerous arguments for reversal, which we shall address in due course. We find none of them persuasive. Therefore, we affirm as to all defendants.

I. Facts

Because the facts in this case are significant and somewhat bizarre, we set them forth in detail. Except as otherwise noted, they appear as related by Lt. Beardsworth, Commanding Officer of the Coast Guard cutter *Cape York*.

The *Cape York* first sighted the defendants' vessel *La Rosa*, a fifty-one foot Morgan sailboat, in the morning of September 15, 1976, as the *La Rosa* sailed southwesterly at a point approximately 8.5 miles [2] southeast of Upper Matecumbe Key, the nearest of the Florida Keys.[3] Since the *La Rosa* displayed no flag and exhibited neither name nor home port on her stern, the *Cape York* approached within twenty-five yards, and Lt. Beardsworth inquired as to the origin and destination of the defendants' voyage and the nationality of their ship. This approach occurred some 8.75 miles from the coast.

Two of the defendants held up a flag that was later identified as that of the Grand Cayman Islands, although at the time "there was some doubt as to exactly which country it was." Record, vol. 2, at 55. Defendant Postal responded that his crew was Australian, that the vessel was of Grand Cayman registry, and that they were en route from the Bahamas to Belize, British Honduras.

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[2] We refer throughout to nautical miles.

[3] In piecing together the facts in this case, we referred to chart No. 11452 of the National Oceanic and Atmospheric Administration (1975), introduced into evidence as Government Exhibit 1.

At this point, the *Cape York* circled the *La Rosa* and withdrew a short distance, where Lt. Beardsworth and Chief Petty Officer Lewis discussed the situation. Lt. Beardsworth decided to call Coast Guard Headquarters Operations Center in Mami, Florida, and he "informed them of the situation that was developing." *Id.* at 61. The *Cape York* again came alongside the *La Rosa*, and Lt. Beardsworth made the same general inquiries. After this exchange, Lt. Beardsworth decided that the *La Rosa* should be boarded to verify her documentation papers, and he ordered her to heave to and stand by for boarding.

Postal refused to allow the boarding. Lt. Beardsworth informed his superiors at the Operations Center, who directed that the boarding be conducted. At approximately this time, Lt. Beardsworth saw Postal holding what he thought to be a pistol.[4] Postal was again ordered to heave to for boarding, and this time Lt. Beardsworth explained that the boarding was for "violation of international agreements in that the name and the home port were not on the stern." *Id.* at 65. Postal then agreed to receive one boarding officer.

Shortly after this dialogue, the *La Rosa* began to maneuver erratically, apparently to make boarding more difficult. At this time, papers were observed being jettisoned from the *La Rosa*. The crew of the *Cape York* retrieved the papers and discovered that they were pieces of charts and of what appeared to be a ship's log. These scraps revealed that approximately one month previously the *La Rosa* had been in the southern Caribbean near Aruba and at points in South America. See note 42 *infra*. They also made reference to a "contact having been made and so many days more to go." *Id.* at 70.

Before Lt. Beardsworth closely examined these papers, however, CPO Lewis had boarded the *La Rosa*. This board-

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[4] The only firearm that was discovered aboard the *La Rosa* was a Very flare pistol. Record, vol. 2 at 139-40.

ing took place approximately 10.5 miles from the coast.[5] CPO Lewis testified that he asked Postal for the *La Rosa*'s documentation and the defendants' identifications. CPO Lewis related that Postal agreed to produce the documents but refused to show identification.

CPO Lewis's further testimony revealed that before the documents were produced, Postal asked him the rather startling question "Can you be bought?" *Id.* at 182. CPO Lewis responded that he could not, but Postal persisted, continuing that he had been in the Coast Guard himself but had "found a better way to make a living," and he repeated the previous offer, which was again refused. CPO Lewis asked the defendants, "You guys are not Australians." They jokingly replied, "Why, don't we sound like them?" *Id.* at 171. CPO Lewis also noted that the *La Rosa*'s hatches, which had been open before his boarding, were now closed and that Chitty was sitting on the forward hatch. *Id.* at 170. At sometime during this board, one of the defendants asked, "Aren't we outside of the 12-mile limit?" *Id.*, vol. 3, at 218.

The documents were produced, and among them was a registry from the Grand Cayman government. CPO Lewis radioed the information concerning the *La Rosa*'s registry to the *Cape York*, after which he was ordered to return to the *Cape York*. At no time during this boarding were the defendants given *Miranda* warnings.

During the ten to fifteen minutes that CPO Lewis was aboard the *La Rosa*, the *Cape York* had been in constant contact with the Operations Center in Miami. The information relating to the documents was relayed to Miami, and CPO Lewis was ordered to return because the *La Rosa*'s registry was verified. Upon his return, CPO Lewis related the events that had transpired while he was aboard the *La*

[5] Although not specifying an exact distance, the district court found that the first boarding occurred within 12 miles. Record, vol. 2, at 335. Since this finding is not clearly erroneous, we take it as established.

Rosa. He told Lt. Beardsworth, "I think these guys are dirty." *Id.*, vol. 2, at 176. By this he meant, of course, that he believed the *La Rosa* to be transporting contraband.

These circumstances were also reported to Coast Guard officials at the Operations Center in Miami, and they ordered the *Cape York* to maintain overt surveillance of the *La Rosa*. Immediately after CPO Lewis returned to the *Cape York*, the *La Rosa* changed from her initial course of 235° (approximately southwest by west) to one varying between 235° and 200° (approximately south by southwest), thus taking her from a course roughly parallel to the coast to one up to 35° away from the coast. *Id.* at 84, 114-17. This somewhat erratic course was maintained throughout the surveillance period.

Lt. Beardsworth conferred with the Operations Center at some length as to the proper course of action to be taken. Eventually, the decision was made to board the *La Rosa* and conduct a customs search, at which time general quarters was sounded and the *La Rosa* was approached under a show of force. She was boarded for the second time some two and one-half to three hours after the first boarding. By this time the *La Rosa*'s course had taken her outside the twelve-mile limit, and the second boarding transpired perhaps some 16.3 miles from the nearest United States coastline.[6]

The second boarding party consisted of CPO Lewis, who was armed with a .45 calibre pistol, and two other Coast Guardsmen, one of whom ported a shotgun. CPO Lewis testified that he read the defendants their *Miranda* rights immediately upon this boarding. The defendants, who had been sampling their wares and imbibing spirits in the in-

[6] This was the distance given by the defendants' expert witness. Record, vol. 3, at 311. The Coast Guard took no fix at the time of the second boarding. The Government stipulated that the second boarding took place beyond the 12-mile limit. *Id.*, vol. 2, at 77.

terim, were in a rather odd mood.[7] As the rights were being read, Postal exclaimed, "Hey, he's reading our rights. Gather around." *Id.*, vol. 3, at 200. After the rights were read, Postal asked, "What does that mean?" *Id.* The rights were read again, and the defendants refused to waive them. Postal, sighting Lt. Beardsworth on the wing of the bridge, yelled to him, "Congratulations. This will help your career." *Id.* Defendant Chitty then said, "Let's quit hassling, they're only doing their job." *Id.* at 204. Defendant Forsythe walked to the forward hatch, and, opening it, disclaimed, "Let it be known that I didn't say I was Australian." *Id.* at 205. Postal added, "Oh, does that mean you want to see the pot?" *Id.*

CPO Lewis peered into the hatch and saw numerous bales "of what looked like marijuana," one of which was open. *Id.* at 205. He inquired how much there was, and Postal responded, "About eight thousand pounds. . . . About two and a half million dollars." *Id.* at 206. The defendants were then arrested, after which they offered CPO Lewis a drink and proclaimed, "We're celebrating, first time we've been busted." *Id.* at 233. At this point, CPO Lewis asked Forsythe whether he was "really going to Belize?" Forsythe responded only, "No." *Id.* at 209.

The defendants were removed to the *Cape York*, and the *La Rosa* was taken in tow. Shortly thereafter, Lt. Beardsworth readvised each of the defendants of his *Miranda* rights, and each declined to make any statement at this time other than to give his name and address. CPO Lewis proceeded to search the *La Rosa*, and photographs were taken. He noted that there was little food on board and that what meat there was, was putrefied.

Most of the remaining significant events were related at trial by Chief Machinery Technician Gaskill, who was

[7] CPO Lewis responded on cross-examination that the defendants appeared "stoned" at this point. Record, vol. 3, at 223.

watching over the defendants after they had been transferred to the *Cape York*. A few hours after the arrests, Chitty volunteered to Chief Gaskill, "We made a mistake by throwing the papers overboard and not—laying [*sic*] offshore until a pickup." *Id.* at 247, 269. Gaskill also testified that he overheard a conversation between Postal and Forsythe in which both stated, "It was to be an $80,000—one-time shot for $80,000." *Id.* at 248.

One additional occurrence is noteworthy. Lt. Beardsworth testified that, during the return trip to Miami, Postal mentioned that the *La Rosa* was almost out of fuel. *Id.* at 159, 167.

II. Analysis

We noted at the outset of this opinion that the substantial issue in this case concerns the effect of a treaty violation on the jurisdiction of the court over the defendants. This question involves the complex relationship between domestic and international law. Before we address this important issue, we examine the applicable treaty provisions to establish that they were indeed breached.

A. *The Treaties*

The treaties of concern are the Convention on the High Seas, *opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962), and the Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964). These treaties set forth principles of international law governing the relations of the ratifying states[8] with respect to terri-

[8] The record reflects that the *La Rosa* was of Grand Cayman registry. Record, vol. 2, at 4. The Grand Cayman Islands are a territory of the United Kingdom, which ratified the Convention on the High Seas and the Convention on the Territorial Sea and

torial seas, those waters adjacent to a state's coast and subject to its sovereignty, and to the high seas, those waters lying seaward of the territorial seas and subject to the sovereignty of no state. *United States v. Louisiana,* 394 U.S. 11, 22-23, 89 S.Ct. 773, 780-81, 22 L.Ed.2d 44 (1969); *United States v. Warren,* 578 F.2d 1058, 1064-65 n.4 (5th Cir. 1978) (en banc).[9]

Contiguius Zone on March 14, 1960. Under United Kingdom practice, treaties entered into by the United Kingdom apply to all its territories unless subject to provision to the contrary. A. McNair, *The Law of Treaties* 116-17 (1961). The ratification papers make no exception for the Grand Caymans, and, therefore, the conventions are operative with respect to vessels of Grand Cayman registry.

That the *La Rosa* is the registered vessel of a ratifying state distinguishes this case from our recent decisions in *United States v. Cadena,* 585 F.2d 1252 (5th Cir. 1978), and *United States v. Cortes,* 588 F.2d 106 (5th Cir. 1979). In *Cadena,* a freighter of Canadian registry was seized some 200 miles at sea. Canada had not ratified the Convention on the High Seas, and we held that the provisions of the treaty were unavailable to the defendants for that reason. 585 F.2d at 1261-62. Similarly, in *Cortes* we held the treaty afforded no protection to a stateless vessel boarded on the high seas. 588 F.2d at 110.

[9] The third maritime area consists of the internal waters of a state. These waters include the state's "rivers, lakes, and canals within its land area and . . . the areas of sea on the landward side of the baseline of the territorial sea." *Restatement (Second) of Foreign Relations Law of the United States* § 13 (1965); *see* Convention on the Territorial Sea and the Contiguous Zone art. 5. These waters are considered a part of the state's territory, and therefore the state may exclude foreign vessels altogether, *United States v. Louisiana,* 394 U.S. 11, 22, 89 S.Ct. 773, 780, 22 L.Ed.2d 44 (1969), subject to the right of entry in distress. *Restatement, supra,* § 48. The conventions in issue here, although delimiting the outward boundary of the inland water by establishing the method of determining the baseline of the territorial sea, which is adjacent to the inland waters, do not define rights and obligations within the inland waters.

The territorial sea, although defined in the Convention on the Territorial Sea and the Contiguous Zone,[10] is not delimited by these conventions. The limits asserted by coastal states are therefore to be judged under customary international law. Jessup, *The United Nations Conference on the Law of the Sea,* 59 Colum.L.Rev. 234, 246 (1959); *see Anglo Norwegian Fisheries Case,* [1951] I.C.J. 116, 132. The United States has long adhered to the widely accepted international rule that the territorial sea extends to three miles from the coast. *E. g., United States v. California,* 332 U.S. 19, 33-34, 67 S.Ct. 1658, 1666, 91 L.Ed. 1889 (1947); *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 122-23, 43 S.Ct. 504, 507, 67 L.Ed. 894 (1923); P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 49-60 (1927). The sovereignty of the coastal state extends into the territorial Sea and the Contiguous Zone art. 1, with the proviso that foreign vessels enjoy the right of innocent passage through it.[11] *Id.* art. 14-23.

Beyond the territorial sea lie the high seas. *See* Convention on the High Seas art. 1. These waters are freely accessible to all nations and are not subject to the sovereignty of any nation. *Id.* art. 2. The regulation of a vessel on the high seas is normally the responsibility of the nation whose flag that vessel flies, and of that nation alone. *Id.* arts. 5, 6. Article 6 provides, in pertinent part, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these

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[10] Article 6 defines the territorial sea as those waters lying between the baseline and "the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."

[11] The right of innocent passage is the right of foreign vessels to pass through the territorial sea in a manner that "is not prejudicial to the peace, good order or security of the coastal state." *Id.* art. 4; *see* 4 M. Whiteman, *Digest of International Law* 343-480 (1965).

articles, shall be subject to its exclusive jurisdiction on the high seas."

The exclusivity of the flag nation's jurisdiction over its ships on the high seas is indeed qualified by provisions in both treaties. Article 24 of the Convention on the Territorial Sea and Contiguous Zone establishes a belt of the high seas contiguous to the territorial sea. In this zone the coastal state is justified in interfering with foreign vessels in certain limited instances. Article 24 provides in part as follows:

> 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
>
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

Although section 2 of article 24 limits to twelve miles the breadth of the zone in which a coastal state may exercise control for the purposes enumerated in that article, article 23 of the High Seas Convention authorizes hot pursuit of foreign vessels beyond twelve miles. It provides, in pertinent part:

> 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State,

> and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. . . . If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

Another exception to the principle of noninterference on the high seas, traditionally known as the right of approach or visitation, is embodied in article 22 of the Convention on the High Seas, which provides, in pertinent part, as follows:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> (a) That the ship is engaged in piracy; or
>
> (b) That the ship is engaged in the slave trade; or
>
> (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
>
> 2. In the cases provided for in subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

These are the principal provisions that we must construe to decide this case. The defendants argue that the board-

ings and seizure of the *La Rosa* breached the conventions and cannot be justified under the doctrine of hot pursuit. We agree that the second boarding of the *La Rosa,* which occurred beyond the twelve-mile limit, was not justifiable under the conventions, but we disagree as to the first, which occurred within. We shall begin our analysis with the first boarding.

1. The First Boarding

[1] The record reflects that the initial boarding of the *La Rosa* was not prompted by suspicion that she was in violation of any of the regulations enumerated in article 24 of the Convention on the Territorial Sea and Contiguous Zone, *i.e.*, customs, fiscal, immigration, and sanitary laws. We may assume, without deciding, that the boarding of a foreign vessel on the high seas is not within the authority of article 24 in the absence of some particularized suspicion that one of the enumerated regulations has been or will be violated,[12] for we find that the boarding was justified by another doctrine of international maritime law, the right of approach.

As we have noted, the right of approach is codified in article 22 of the Convention on the High Seas, which pro-

[12] It has been suggested by several commentators that boardings of foreign vessels to enforce customs laws must be predicated upon some suspicion to comport with international law. *See* W. Masterson, *Jurisdiction in Marginal Seas* 229-30 (1929); Carmichael, *At Sea with the Fourth Amendment,* 32 U.Miami L.Rev. 51, 102 (1977). The rule regarding the boarding and inspection of American flag vessels by the Coast Guard should be contrasted. American vessels are subject to boarding for documentation and safety inspections without suspicion of illegality. *United States v. Warren,* 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc).

The boarding of a vessel on the high seas by its flag state is not an international event. The consequences are solely a domestic matter. The boarding of a foreign vessel is, of course, a matter of international concern that might call for more restraint on the part of the boarding state. *See Lauritzen v. Larsen,* 345 U.S. 571, 582, 73 S.Ct. 921, 928, 97 L.Ed. 1254 (1953).

vides that the boarding of a foreign *merchant* ship is not justified unless there is reasonable suspicion that the ship is engaged in piracy, the slave trade, or is the same nationality as the warship.[13] Since the article merely prohibits the boarding of merchant vessels except for the limited purposes set forth, it does not expressly address the situation of the boarding of foreign private *pleasure* craft, which, from all appearances, the *La Rosa* appears to have been. See part II. 2 *infra*. We think it follows, however, that a justification for boarding a merchant vessel would apply a fortiori to a pleasure craft.[14]

We find that the boarding of the *La Rosa* comes within the exception in article 22 for suspicion that the foreign ship is of United States nationality. The record discloses ample grounds for suspecting the *La Rosa*'s nationality. She was flying no flag and exhibited neither name nor home port on her stern. The absence of these outwardly visible manifestations of nationality is surely cause for suspicion in view of the obligation imposed by most national shipping laws that registered vessels fly the flag of the state of national character. M. McDougal & W. Burke, *The Public Order of the Oceans* 1121 (1962). Moreover, "[e]very State must register the names of all private vessels sailing under its flag, and it must make them bear their names visibly so that every vessel may be identified at a distance." 1 L. Oppenheim, *International Law* 597 (8th ed. Lauterpacht 1955); *e. g.*, 46 U.S.C. §§ 45, 46, 103 (1970).

The record does show that upon inquiry the crew of the *La Rosa* exhibited what was later determined to be a Grand

[13] Coast Guard vessels qualify as war ships. *See United States v. Cadena,* 585 F.2d 1252, 1260 n.16 (5th Cir. 1978); Convention on the High Seas art. 8(2).

[14] This is not to say, as we shall demonstrate below, that a foreign pleasure craft may avail itself of article 22's prohibition on boardings of merchant vessels for purposes other than those set forth.

Cayman flag and that Postal claimed that the *La Rosa* was of Grand Cayman registry. The mere display of a flag and claim of nationality is not conclusive, however. *See* M. McDouglas & W. Burke, *supra,* at 1120; 1 L. Oppenheim, *supra,* at 604. Accordingly, article 22 provides that if suspicions persist, the foreign vessel may be boarded to verify the ship's right to fly its flag. Lt. Beardsworth testified that he could not clearly discern the nationality of the flag displayed by the *La Rosa*'s crew and that the absence of name and home port caused him to be doubtful as to the vessel's true nationality. Record, vol. 2, at 55, 63. After conferring with the Operations Center in Miami, the decision was made to board the *La Rosa* to verify the nationality, and article 22 was cited as authority for the boarding. See *id.* at 107.

We think it clear, therefore, that there were reasonable grounds to doubt that the *La Rosa* was of Grand Cayman registry, but article 22 requires that the vessel approached must be suspected of being of the nationality of the approaching warship. Viewing the circumstances objectively, as we must, *see Scott* v. *United States,* 436 U.S. 128, 137, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978), we think it would have been reasonable to suspect that the *La Rosa* was of American nationality. The *La Rosa* was sailing in close proximity to the coast of the United States. When first hailed, the crew displayed a flag of uncertain identity, claimed to be of Grand Cayman registry, and said they were Australians enroute to Belize. The crewman who answered, however, had no discernible accent. After initially refusing to heave to for boarding, Postal relented, but the *La Rosa* then proceeded to maneuver evasively in an attempt to prevent boarding. At this point the crew began jettisoning papers over the side. On the basis of all these facts, we think that it was reasonable for the Coast Guard to conclude that the *La Rosa* was not of the registry she claimed to be and, from her diligent efforts to evade a United States Coast Guard vessel in United States waters, that she was in all likelihood an American vessel making a last ditch

effort to avoid apprehension. Although we do not find these circumstances compelling grounds for suspecting that the *La Rosa* was of American registry, we find the inference a reasonable one. Therefore, we find CPO Lewis's initial boarding to verify the *La Rosa*'s documentation within the ambit of article 22.[15]

2. The Second Boarding

We do conclude, however, that the second boarding of the *La Rosa,* which by stipulation occurred beyond the twelve-mile limit, was in violation of article 6 of the High Seas Convention. As we have seen, that article proclaims the exclusive jurisdiction of a nation over its vessels, subject only to treaty provision to the contrary. We find that article 6 was infracted because no treaty provision justifies the second boarding or the ultimate seizure of the *La Rosa.* The only arguably applicable treaty provisions that might justify the boarding and search are those of hot pursuit and the right of approach. We shall discuss them in order below.

Under section 1 of article 23 of the High Seas Convention, set forth above, hot pursuit "must be commenced when the

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[15] Statutory authority for this boarding is found in 19 U.S.C. § 1581(a) (1976), which provides that customs officers (defined to include Coast Guard officers by 14 U.S.C. § 89(b) (1976) and 19 U.S.C. §§ 1401(i), 1709(b) (1976)) "may at any time go on board of any vessel . . . at any place . . . within the customs waters [defined in 19 U.S.C. § 1401(j) (1976) as those waters within twelve miles of the Coast of the United States] . . . and examine the manifest and other documents and papers." Customs regulations also validated the boarding. 19 C.F.R. § 162.3 (1978). *See United States v. Freeman,* 579 F.2d 942, 945 n.4 (5th Cir. 1978).

We need not decide whether the Coast Guard would have been justified, under article 22, in boarding the *La Rosa* at the point at which Lt. Beardsworth ordered her to heave to. We measure the permissibility of the boarding on the basis of all the facts and circumstances known as of the time of the actual boarding and find it justified.

foreign ship . . . is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted." We conclude below that ample probable cause arose within the contiguous zone, by virtue of the first boarding, to believe that the *La Rosa* had violated customs laws. And we may assume that the pursuit of the *La Rosa* was uninterrupted; but the crucial question remains: When, if ever, did *hot* pursuit commence? The answer is supplied by section 3 of article 23, which provides in relevant part as follows:

> Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued [a] within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

As one author who has exhaustively treated the subject of hot pursuit writes, "The practical importance of these prerequisites is that if the foreign vessel succeeds in reaching the high seas before these conditions have been met, hot pursuit is not considered lawfully commenced and no continuation of the pursuit may take place on the high seas." N. Poulantzas, *The Right of Hot Pursuit in International Law* 200 (1969).

[2] As regards the first prerequisite to the commencement of hot pursuit, the determination of location, the record reflects that the *Cape York* took a radar fix at the time of the first boarding. Record, vol. 2, at 130. We may assume, without deciding, that such means satisfy the requirement that position be determined by "such practical means as may be available," *see* N. Poulantzas, *supra,* at 201-04, for it is

clear that the second prerequisite, the giving of visual and auditory signals to stop, did not occur until immediately before the second boarding, which took place beyond the twelve-mile limit. As Dr. Poulantzas points out, "the signal to stop . . . is of considerable significance since pursuit is considered to have lawfully started only at the moment when a signal to stop is clearly given to the suspected vessel." *Id.* at 204; *see Gillam v. United States*, 27 F.2d 296, 299 (4th Cir. 1928). We conclude, therefore, that the doctrine of hot pursuit is not available on these facts.

[3] Turning again to article 22 of the High Seas Convention, we find it wholly inapplicable here. First, it is not available to the Coast Guard as a justification for the second boarding because there could have been no reasonable suspicion that the *La Rosa* was engaged in piracy or the slave trade or that she was not of Grand Cayman registry. The record discloses absolutely no evidence that would have supported any suspicion that she was pirating or slaving, and the first boarding was aborted precisely because her registry was conclusively verified. Second, article 22 is not available to the defendants as a prohibition on the boarding independent of the general prohibition of article 6 since it prohibits a warship from engaging "foreign *merchant* vessels" unless one of the three enumerated exceptions is applicable. *See United States v. Cadena,* 585 F.2d 1252, 1260 (5th Cir. 1978) (seizure of foreign freighter beyond twelve miles may violate article 22) (dictum). The article contains no express prohibition on the boarding of nonmerchant ships. The Conventions do not define "merchant ship," *cf. Calmar Steamship Corp. v. United States,* 345 U.S. 446, 456, 73 S.Ct. 733, 738 97 L.Ed. 1140 (1953) (defining merchant ship as one "operated for hire" for purposes of § 2 of the Suits in Admiralty Act, 46 U.S.C. § 742 (1970)), but we need not define the term here, for the defendants do not claim that the *La Rosa* was a merchant vessel. Indeed,

in their brief to this court they claim that she was merely a pleasure craft. Joint Brief for the Defendant-Appellants at 23 n.2.

Having determined that the second boarding of the *La Rosa* cannot be justified as within the hot pursuit provisions of article 23 of the Convention on the High Seas or the right of approach provisions of article 22, we find that article 6 of the Convention on the High Seas was violated. This conclusion, however, does not end our inquiry; the issue remains as to the effect of the violation upon the defendants' convictions. To this important issu ewe now turn.

B. *The Effect of the Treaty Violation*

The defendants contend that because the second boarding was in violation of a treaty obligation of the United States, the district court did not have jurisdiction over them. We would summarily dismiss the defendants' contention, under the authority of ample precedent, if it concerned a mere violation of law not embodied in a treaty binding on the United States. A defendant may not ordinarily assert the illegality of his obtention to defeat the court's jurisdiction over him. *Gerstein v. Pugh,* 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975); *Frisbie v. Collins,* 342 U.S. 519, 522, 72 S.Ct. 509, 511-12, 96 L.Ed. 541 (1952); *Ker v. Illinois,* 119 U.S. 436, 444, 7 S.Ct. 225, 229, 30 L.Ed. 421 (1886); *United States v. Quesada,* 512 F.2d 1043, 1045 (5th Cir.), *cert. denied,* 423 U.S. 946, 96 S.Ct. 356, 46 L.Ed.2d 277 (1975); *United States v. Winter,* 509 F.2d 975, 985-86 (5th Cir.), *cert. denied sub nom. Parks v. United States,* 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); *Voigt v. Toombs,* 67 F.2d 744 (5th Cir. 1933), *cert. dismissed,* 291 U.S. 686, 54 S.Ct. 442, 78 L.Ed. 1072 (1934). This proposition, the so-called *Ker-Frisbie* doctrine, is equally valid where the illegality results from a breach of international law not codified in a treaty.[16] *United States v. Cadena,* 585 F.2d 1252, 1259-60 (5th Cir. 1978); *United States v. Winter,* 509 F.2d at 988-89; *Autry v. Wiley,* 440 F.2d 799, 802 (1st Cir. 1971); *see United States v. Quesada; United States v. Lopez,* 542 F.2d 283 (5th Cir. 1976) (per curiam). These precedents

> rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Frisbie v. Collins, 342 U.S. at 522, 72 S.Ct. at 512.[17]

Where a treaty has been violated, the rules may be quite different, as was demonstated by the Supreme Court in the case of *Cook v. United States,* 288 U.S. 102, 53 S.Ct. 305,

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[16] Commentators have roundly criticized this principle, largely on the basis that courts should not implicitly sanction violations of international law. *E. g.,* Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law,* 28 Am.J. Int'l L. 231 (1934); *Harvard Research Draft Convention on Jurisdiction with Respect to Crime,* art. 16, reprinted in 29 Am.J. Int'l L. 435, 623-32 (Supp. 1935); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law,* 29 Brit.Y.B. Int'l L. 265 (1952); Scott, *Criminal Jurisdiction of a State Over a Defendant Based upon Presence Secured by Force or Fraud,* 37 Minn. L.Rev. 91 (1953). Since we are bound by the precedence of *Ker* and *Frisbie,* we have no occasion to reexamine their wisdom.

[17] In *United States v. Toscanino,* 500 F.2d 267 (2d Cir. 1974), the Second Circuit indicated that the precedence of *Frisbie* had been eroded by Supreme Court decisions establishing expanded notions of due process, such as *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding that due process requires exclusionary rule to be applied in state trials). 500 F.2d at 272-73. The court in *Toscanino* held that the due process violation found there acted to divest the district court of jurisdiction over

77 L.Ed. 641 (1933). *Cook* involved a libel brought against the British vessel *Mazel Tov,* which had been seized for smuggling liquor into the United States. The Court held that the seizure had been effected in violation of a treaty between the United States and Great Britain.[18] The Court recognized the forfeiture principle paralleling the *Ker-*

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a defendant who had been forcibly abducted from Uruguay. The defendant had been subjected to brutal torture and incessant interrogation for some 17 days.

The Second Circuit has, however, limited *Toscanino* to its outrageous facts. In *Lujan v. Gengler,* 510 F.2d 62 (2d Cir.), *cert. denied,* 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975), the court refused to extend the *Toscanino* rationale to a defendant who had not been subjected to the "cruel, inhuman and outrageous treatment allegedly suffered by Toscanino." *Id.* at 65. The court continued, "Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process." *Id.* at 66.

This circuit has declined to follow the *Toscanino* rationale, *United States v. Winter,* 509 F.2d at 987; *United States v. Herrera,* 504 F.2d 859, 860 (5th Cir. 1974), and its continuing validity is questionable after the intervening Supreme Court decision in *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), in which the Court refused to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119, 95 S.Ct. at 865 (citing *Frisbie* and *Ker*). We need not explore the issue of *Toscanino*'s continuing vitality here because the record is devoid of even the slightest evidence of abuse on the part of th Coast Guard. Indeed, it was only because the Coast Guard exercised an abundance of caution in attempting to determine whether the second boarding was justifiable under international law that the *La Rosa* was able to cross over the 12-mile limit before she was seized.

[18] The treaty permitted the seizure of British vessels reasonably suspected of liquor smuggling, but only within one hour's sailing distance of the coast. Convention for Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, United States-Great Britain, 43 Stat. 1761, quoted in note 32 *infra.* The *Mazel Tov* was apprehended beyond the hour's sailing distance but within the twelve-mile customs enforcement zone established by statute.

Frisbie doctrine that the wrongful acquisition of property against which a libel has been filed does not affect the court's jurisdiction over the property. 288 U.S. at 121, 53 S.Ct. at 312. It went on, however, to hold this principle inapplicable because the United States "had imposed a territorial limitation upon its own authority" by entering into the treaty. *Id.* "Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws." *Id.*

The result in *Cook* had been presaged by the Supreme Court in *Ford v. United States,* 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927), a prosecution for conspiracy to violate the liquor smuggling statutes. That case concerned the same treaty construed in *Cook,* and the Court expressly distinguished *Ker v. Illinois.*

> The Solicitor General [asserts], on the authority of *Ker v. Illinois* . . . , that an illegal seizure would not have ousted the jurisdiction of the court to try the defendants. But the Ker Case does not apply here. It related to a trial in a state court, and this court found that the illegal seizure of the defendant therein violated neither the federal Constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their [*sic*] trial after alleged seizure was not a matter of federal cognizance. Here a treaty of the United States is directly involved, and the question is quite different.

273 U.S. at 605-06, 47 S.Ct. at 535. Although the convictions in *Ford* were affirmed because the defendants had not timely raised the jurisdictional issue, the just-quoted dictum was given operative effect in two criminal prosecutions concerning seizures in violation of a treaty between the United States and Panama that was essentially the same as the treaty construed in *Cook* and *Ford.* In *United States v. Schouweiler,* 19 F.2d 387 (S.D.Cal. 1927), and *United States*

v. Ferris, 19 F.2d 925 (N.D.Cal. 1927), pleas to the jurisdiction of the district court were sustained, and the prosecutions were dismissed.

Cook and *Ford* must be viewed in the fuller context of treaty law to appreciate their reasoning, for it is not true that every treaty to which the United States is a party acts to limit the jurisdiction of its courts. Article 6 of the United States Constitution declares treaties made "under the Authority of the United States [to] be the supreme Law of the Land," but it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing. *Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888); *Foster v. Neilson,* 27 U.S. (2 Pt.) 253, 311, 7 L.Ed. 415 (1829); *Sei Fujii v. State,* 38 Cal.2d 718, 242 P.2d 617 (1952); Dickinson, *Are the Liquor Treaties Self-Executing?,* 20 Am.J. Int'l L. 444 (1926). In *Whitney v. Robertson,* the Court explained:

> A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

124 U.S. at 194, 8 S.Ct. at 458.

Most significantly, the court in *Cook* declared the treaty in issue there to be self-executing. "[I]n a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions." 288 U.S. at 119, 53 S.Ct. at 311 (footnote omitted).

The Court went on to hold that the treaty, being self-executing and therefore etquivalent to federal legislation, superseded a customs statute that would otherwise have validated the seizure. *Id.;* see note 18 *supra.*

[4, 5] We read *Cook* and *Ford* to stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction.[19] The law of treaties teaches, however, that treaties may have this effect only when self-executing. Therefore, the determinative issue in the case before us is whether article 6 of the Convention on the High Seas is self-executing. *See* Ficken, *The 1935 Anti-Smuggling Act*

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[19] In *United States v. Winter,* 509 F.2d 975 (5th Cir.), *cert. denied sub. nom. Parks v. United States,* 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975), we intimated in dictum that the *Ford* decision "may well have been significantly undermined even on its own facts, by *Frisbie.*" *Id.* at 989. *Ford,* it will be recalled, distinguished *Ker* on the basis that no federal law had been violated by Ker's illegal abduction and therefore "that the validity of their [*sic*] trial after alleged seizure was not a matter of federal cognizance." 273 U.S. at 605-06, 47 S.Ct. at 535. The Court in *Frisbie,* however, assumed that the defendant had been abducted in violation of the federal kidnapping statute and held that the court's jurisdiction over him was valid notwithstanding. 342 U.S. at 522-23, 72 S.Ct. at 512.

We cannot construe *Frisbie* to overrule either *Ford* or *Cook* because the cases are distinguishable. As the Court in *Frisbie* stated, the federal kidnapping statute was not designed to limit the jurisdiction of the courts but merely to punish and deter kidnapping. 342 U.S. at 522-23, 72 S.Ct. at 512; Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud,* 37 Minn.L.Rev. 91, 95 (1953). The treaty involved in *Ford* and *Cook,* however, was construed by the Court as a self-imposed limitation on the jurisdiction of the United States and hence on that of its courts. Therefore, we find the precedent established in *Ford* and *Cook* vital. *See United States v. Cadena,* 585 F.2d 1252, 1269 (5th Cir. 1978) (dictum).

Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U.Miami L.Rev. 700, 724-27 (1975).[20] We hold that it is not.

[6] The question whether a treaty is self-executing is a matter of interpretation for the courts when the issue presents itself in litigation. *Restatement (Second) of Foreign Relations Law of the United States* § 154(1) (1965), and, as in the case of all matters of interpretation, the courts attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose. *Board of County Commissioners* v. *Aerolineas Peruanasa*, 307 F.2d 802, 806 (5th Cir. 1962), *cert. denied*, 371 U.S. 961, 83 S.Ct. 543, 9 L.Ed.2d 510 (1963); A. McNair, *Law of Treaties* 365 (1961); 1 D. O'Connell, *International Law* 271 (1965). The parties' intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty's promulgation. *Cook*, 288 U.S. at 112, 53 S.Ct. at 308; *Diggs* v. *Richardson*, 180 U.S.App.D.C. 376, 555 F.2d 848, 851 (D.C. Cir. 1976); *Johansson v. United States*, 336 F.2d 809, 813 (5th Cir. 1964).

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[20] Ficken sugests that an unwarranted seizure of a foreign vessel beyond the 12-mile limit would be a violation of article 24 of the Convention on the Territorial Sea and Contiguous Zone. 29 U.Miami L.Rev. at 725. That provision, however, merely permits a coastal state to exercise control for limited purposes within a zone extending from the seaward border of the territorial sea to a maximum of 12 miles from the baseline of the territorial sea. It does not, by its terms, prohibit boardings or seizures beyond the contiguous zone or, for that matter, boardings or seizures within the zone for purposes other than those enumerated, *see United States v. F/V Taiyo Maru*, 395 F.Supp. 413, 419-20 (D.Me. 1975) (enforcement of fishing laws). Therefore, we do not believe that article 24 is implicated here.

The self-execution question is perhaps one of the most confounding in treaty law.[21] "Theoretically a self-executing and an executory provision should be readily distinguishable. In practice it is difficult." Reiff, *The Enforcement of Multipartite Administrative Treaties in the United States*, 34 Am.J.Int'l L. 661, 669 (1940). A treaty may expressly provide for legislative execution. An example is found in articles 27 through 29 of the Convention on the High Seas, each of which begins with the preamble "Every State shall take the necessary legislative measures to . . . ."[22] Such provisions are uniformly declared execu-

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[21] As noted in a memorandum prepared for the use of the Legal Advisor of the State Department, "An examination of adjudicated cases and of some treatises and of some of the law reviews has failed to disclose a clear definition of the term 'Self-Executing Treaty'." Memorandum from Attorney Advisor Diven to Legal Advisor Gross, *Definition of "Self-Executing Treaty,"* MS. Department of State, file 711.009/4-2248 (April 22, 1948), *reprinted in* 14 M. Whiteman, *Digest of International Law* 304 (1970). This observation could not be better illustrated than by the cases of *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) and *United States v. Percheman*, 32 U.S. 27 (7 Pet.) 50, 8 L.Ed. 604 (1833), each of which construed the Florida cession treaty with Spain. In *Foster*, Chief Justice Marshall held the English text of the treaty not to be self-executing. He later repudiated this interpretation in *Percheman*, where the Spanish text was consulted and held to be self-executing.

[22] The full texts of these provisions follow:

Article 27

Every State shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offense. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their

tory. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 311-12, 7 L.Ed. 415 (1829); Dickinson, *supra*, at 448. And it appears that treaties cannot affect certain subject matters without implementing legislation. "A treaty cannot be self-executing . . . to the extent that it involves governmental action that under the Constitution can be taken only by the Congress." *Restatement (Second) of Foreign Relations Law of the United States* § 141(3) (1965). Thus, since article 1, section 9 of the Constitution prohibits the drawing of money from the treasury without congressional enactment, it is doubtful that a treaty could appropriate moneys. *The Over the Top*, 5 F.2d 838, 845 (D.Conn.1925) (dictum); S. Crandall, *Treaties* § 74 (2d ed. 1916). The same appears to be the case with respect to criminal sanctions. *The Over the Top*, 5 F.2d at 845; Dickinson, *supra*, at 449-50.

Apart from those few instances in which the language of provision expressly calls for legislative implementation or the subject matter is within the exclusive jurisdiction of Congress, the question is purely a matter of interpretation. *Id.* at 449. In carrying out our interpretive task, "we may look beyond the written words to the history of the treaty,

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ships, after having taken all necessary precautions to avoid such break or injury.

Article 28

Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

Article 29

Every State shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injurying a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943) (citations omitted). In the specific context of determining whether a treaty provision is self-executing, we may refer to several factors:

> the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self- or non-self-execution.

People of Saipan v. United States Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975). With these principles in mind, we proceed to examine the treaty provision in issue here, article 6 of the Convention on the High Seas.

Article 6 declares the exclusivity of a nation's jurisdiction over the vessels entitled to fly its flag: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." [23] On its face, this language

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[23] Article 6 should be read in conjunction with article 2, which codifies the principle of freedom of the seas. It provides as follows:

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas. These freedoms, and

would bear a self-executing construction because it purports to preclude the exercise of jurisdiction by foreign states in the absence of an exception embodied in treaty. We are admonished, however, to interpret treaties in the context of their promulgation, and we think the context of article 6 compels the conclusion that it is not self-executing.

[7] We start with the observation that the Convention on the High Seas, as its preamble states, is intended to be "generally declaratory of established principles of international law." Indeed, that a state enjoys exclusive jurisdiction over its flag vessels, in the absence of an exception sanctioned under customary international law, is just such a principle. *See The S.S. Lotus,* [1927] P.C.I.J., ser. A, No. 10, at 25; *Le Louis,* 165 Eng.Rep. 1464, 1475 (Admin.1817); 1 L. Oppenheim, *International Law* 589 (8th ed. Lauterpacht 1955). But the question we must answer is whether by ratifying the Convention on the High Seas the United States undertook to incorporate the restrictive language of article 6, which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts. There is nothing in the circumstances surrounding the formulation and adoption of the Convention that would support the conclusion that it did.

The Convention on the High Seas is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize treaties as self-executing.[24] It is difficult

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others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

[24] In Great Britain, for example, "the orthodox view is that treaties are not part of the law of England unless legislation has been enacted incorporating them. It seems therefore that British courts would probably not decline jurisdiction obtained in violation of a treaty." O'Higgins & Dublin, *Unlawful Seizure and Irregular Extradition,* 36 Brit.Y.B.Int'l L. 279, 301 (1960); *see Attorney-General for Canada v. Attorney-General for Ontario,* [1937] A.C. 326, 347 (P.C.)(Can.); A. McNair, *The Law of Treaties* 81-110 (1961).

therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations. This is not to say that by entering into such a multilateral treaty the United States cannot without legislation execute provisions of it, but one would expect that in these circumstances the United States would make that intention clear. The lack of mutuality between the United States and countries that do not recognize treaties as self-executing would seem to call for as much. Here there was no such manifestation.

The 1958 United Nations Conference on the Law of the Sea, which promulgated the conventions at issue here, adopted article 6 verbatim as submitted to it by the International Law Commission, which had been convened to draw a draft convention. *See* International Law Commission, *Report,* 11 U.N. GAOR, Supp. (No. 9) 25, U.N. Doc. A/3159 (1956). As McDougal and Burke point out: "At the 1958 Conference, very little attention was given to this portion of Article 30 [the Commission draft] and even certain inconsequential amendments proposed were not adopted. Article 6(1) therefore embodies the exact wording of Article 30 as it appears in . . . the 1956 Report of the Commission." M. McDougal & W. Burke, *The Public Order of the Oceans* 874 (1962) (footnote omitted). Had the United States interpreted the International Law Commission's draft article as a limitation of its jurisdiction to that expressly conferred by treaty, we think that considerably more attention would have been directed to the article, for a self-executing interpretation would severely curtail the traditional practice of the United States in exercising jurisdiction on the high seas in the absence of treaty

as evidenced by substantial legislation designed to enforce customs regulations there.

A literal reading of article 6 would prohibit the exercise of jurisdiction in all cases that do not come within exceptions embodied in treaty. Therefore, if the article were self-executing, the United States would lack jurisdiction, by virtue of *Cook* and *Ford,* over vessels and their crews seized in the enforcement of interests not expressly recognized by treaty.[25] But, "[n]either international treaties nor succeeding articles of the Convention exhaust the instances in which other competence to apply [sanctions] is honored under international law." M. McDougal & W. Burke, *supra,* at 875; *see United States v. F/V Taiyo Maru,* 395 F.Supp. 413, 420-21 (D.Me.1975).

Since its inception, the United States has asserted limited jurisdiction over vessels on the high seas, generally but not always within the twelve-mile limit, to enforce a variety of interests not expressly authorized in treaties. As early as 1790, the United States professed authority to board vessels beyond the three-mile territorial sea.[26] In An

[25] This statement is subject to the qualification that the United States would not lack jurisdiction to adjudicate seizures made pursuant to federal legislation enacted afted the date of ratification (April 12, 1961) since subsequent federal legislation overrides prior self-executing treaty provisions. *Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888); *Edye v. Robertson (The Head Money Cases),* 112 U.S. 580, 599, 5 S.Ct. 247, 254 (1884).

[26] In the same year Congress created the Revenue Cutter Service (later to become the Coast Guard), ch. 35, § 62, 1 Stat. 175 (1790)), whose officers

> shall respectively be deemed officers of the customs, and shall have power and authority to go on board of every ship or vessel which shall arrive within the United States, or within four leagues of the coast thereof, if bound for the United States, and to search and examine the same and every part thereof, and to demand, receive and certify the manifests herein before required to be of certain ships or vessels.

Ch. 35, § 64, 1 Stat. 175 (1790).

Act to Provide More Effectually for the Collection of Duties, ch. 35, 1 Stat. 145 (1790), the United States first specified a twelve-mile limit in which foreign vessels bound for the United States could be boarded to examine their manifests and inspect their cargoes. The Act also prohibited the unloading of foreign goods within twelve miles. Severe sanctions, including fines and forfeitures, were imposed for violation of its provisions.[27]

The Supreme Court, in the seminal case of *Church v. Hubbart,* 6 U.S. (2 Cranch) 187, 2 L.Ed. 249 (1804), approved this legislation as within the sphere of a nation's competence to protect against the violation of its laws beyond the territorial sea. Chief Justice Marshall, writing for the Court, made the following observations in dictum:

> The authority of a nation, within its own territory, is absolute and exclusive . . . But its power to assure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas, for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself, by the assistance intended for his enemy; so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations

[27] This Act is extensively discussed in W. Masterson, *Jurisdiction in Marginal Seas* § 43 (1929).

> will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

6 U.S. at 234-35, 2 L.Ed. at 264-65. This proposition was buttressed by reference to the United States' practice as reflected in the customs statutes discussed above giving the right to "our own revenue cutters to visit vessels four leagues from our coast." *Id.* at 236, 2 L.Ed. at 265. More particularly, Justice Story, interpreting the successor to the provision of the 1790 Act prohibiting unloading of cargoes within four leagues of the coast without payment of duties, wrote, "[T]he policy of the act equally applies to all vessels; and indeed more strongly to foreign vessels; since frauds committed by them in evasion of the revenue laws are less easily detected, then like frauds are under the regulations applicable to American vessels." *The Betsy*, 3 F.Cas. 303, 304 (C.D.Mass.1818) (No. 1,365).

The 1790 Act is the progenitor of successive enactments authorizing the boarding and searching of foreign vessels within twelve miles of the coast of the United States and imposing penalties for violations of customs provisions operating within that limit.[28] Through the years the courts have had numerous occasions to address the issue of the propriety of the exercise of United States jurisdiction over foreign vessels within twelve miles but beyond three miles

[28] The history of some of these provisions is recounted in considerable detail in Carmichael, *At Sea with the Fourth Amendment*, 29 U.Miami L.Rev. 51, 65-69 (1977). The present descendants of this early act include 19 U.S.C. §§ 1401(j), 1709(c) (1976) (defining "customs waters" as those within twelve miles of the coast, 19 U.S.C. § 1581 (1976)) (providing for boardings and searches within customs waters), and 19 U.S.C. § 1586 (1976) (imposing penalties for unloading or transshipment within customs waters).

under these statutes and in the absence of treaty. A sampling of those cases is collected in the margin.[29]

It is clear, therefore, that the consistent attitude of the United States has been that it may assert limited jurisdiction over foreign vessels within twelve miles of its coast. Although the conventions we construe today do provide for some control within this zone, the ambit of this control is much narrower than that which the United States has customarily asserted. *See United States v. F/V Taiyo Maru*, 395 F.Supp. 413 (D.Me 1975); M. McDougal & W. Burke, *supra*, at 612-31, 875. A self executing interpretation, which would eviscerate many of these provisions, would, therefore, be wholly inconsonant with the historical policy of the United States.

The United States has not, however, limited its claims of jurisdiction to twelve miles.[30] In an attempt to quell the

[29] *The Metmuzel*, 49 F.2d 368 (4th Cir.), *cert. denied*, 283 U.S. 866, 51 S.Ct. 657, 75 L.Ed. 1470 (1931); *The Cherie*, 13 F.2d 992 (1st Cir. 1926)); *The Henry L. Marshall*, 292 F. 486 (2d Cir. 1923); *United States v. Bengocha*, 279 F. 537 (5th Cir. 1922); The Amaranth, 35 F.2d 872 (S.D.N.Y.1929); *The Mistinguette*, 14 F2d 753 (S.D.N.Y.1926); *The Mariel E. Winters*, 6 F.2d 466 (S.D.Tex.1925); *The Grace and Ruby*, 283 F. 475 (D.Mass.1922).

[30] We think it significant that the United States now asserts a 200 mile fishery conservation zone, which was established by the Fishery Conservation Act of 1976, Pub.L. No. 94-265, 90 Stat. 331. These provisions are codified in 16 U.S.C.A. §§ 1801-1882 (West Supp.1978), and they became effective as of March 1, 1977. Section 1812 establishes "exclusive fishery management authority" over all fish within the conservation zone, all anadromous species throughout their migratory range even if beyond the zone, and all Continental Shelf fishery resources beyond the zone. Section 1821 prohibits the taking of fish covered under § 1812 in the absence of agreement with the foreign nation concerned. Vessels of such nations must obtain permits under § 1824. The Act provides for civil and criminal penalties for foreign vessels found in

ever increasing smuggling of alcohol into the United States, Congress enacted the 1935 Anti-Smuggling Act, Act of Aug. 5, 1935, Pub.L. No. 238, 49 Stat. 517. This act, presently codified at 19 U.S.C. §§ 1701-1711 (1976), empowers the President, upon belief that a hovering vessel is engaged in smuggling "any merchandise or person," *id.* § 1701(a), to designate temporary enforcement zones in the place where such vessel is found. These zones may extend up to sixty-two miles from the coast and 100 miles laterally in both directions from the vessel. *Id.* The Act goes on to authorize customs officers to board and inspect "any vessel" within such zone and "to pursue and seize or arrest and otherwise enforce upon such vessel, merchandise, or person, the provisions of the law . . . ." *Id.* § 1701(b). The committee reports clearly indicate that the Act was founded on the rule of *Church v. Hubbart,* discussed above, and they make clear that Congress believed it was acting in accordance with established precedent, both domestic and international.[31]

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violation of it, §§ 1858-1860, and the Coast Guard is given broad enforcement powers under § 1861.

This act, of course, supersedes the conventions we construe today, whether self-executing or not, because it came into force subsequent to them. See note 25 *supra.* Therefore, the Act is not an example of legislation that could be affected by article 6 of the High Seas Convention in any event. But we do think it clear evidence of the consistent policy of the United States in asserting jurisdiction for limited purposes beyond even the 12-mile limit and even in the absence of treaty.

[31] [T]here is no fixed rule among the customs and usages of nations which prescribes the limits of jurisdictional waters other than the rule of reasonableness, that a nation may exercise authority upon the high seas to such an extended and to so great a distance as is reasonable and necessary to protect itself and its citizens from injury. This principle, which is believed to be controlling law today, was established in American law by Chief Justice Marshall in ***Church v. Hubbart*** . . . S. Rep. No. 1036, 74th Cong., 1st Sess. 5 (1935).

A recent article examined at length the interrelationship between the Anti-Smuggling Act and the Conventions on the High Seas and on the Territorial Sea and Contiguous Zone. Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law,* 29 U. Miami L.Rev. 700 (1975). In his article, Ficken notes an issue strictly analogous to the one before us: "whether a United States court would uphold a seizure or arrest [under the Act] in view of the [*Cook*] exception indicating the possibility that the United States has by treaty imposed upon itself a territorial restriction of its jurisdiction." *Id.* at 724. He goes on to reason that "the approach to the issue is similar to the construction of the liquor treaty in the [*Cook*] case, the issue turning upon whether the treaty provision were given a self-executing character." *Id.* We have, therefore, in the 1935 Anti-Smuggling Act apparently another instance where a self-executing interpretation of article 6 of the High Seas Convention[32] would abrogate the legislative policy of the United States. Ficken concludes, however, that "it is doubtful whether it has changed any existing internal legislation." *Id.*

That we do not believe that it was the intent of the United States to so limit the operation of its statutes is borne out by the legislative history of the conventions. In testimony before the Senate Foreign Relations Committee, Mr. Arthur Dean, the Chairman of the United States Delegation to the 1958 Law of the Sea Conference, made the following remarks in response to questioning:

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[32] As we indicated above in note 20, Ficken analyzes the problem from the asumption that the seizure of a foreign vessel beyond 12 miles would be a violation of article 24 of the Convention on the Territorial Sea and Contiguous Zone. Although we disagree with his assumption in that we believe article 6 of the Convention on the High Seas provides the operative rule, we think his argument may otherwise have validity.

[Senator Long] Mr. Dean, would you point out and explain any article of these conventions which has the effect of superseding domestic legislation in the United States, either Federal or State legislation, and would you also point out any articles which would require new Federal legislation?

Mr. Dean. Well, so far as I am aware, there is not anything in any of these conventions that we are presenting to the Senate which, sa far as I am specifically aware, there is not anything that would supersede domestic legislation. I know you are familiar with the case of *Missouri v. Holland* [252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920)] that insofar as the United States has entered into a treaty that then becomes the law of the land. In all my work on these matters and study on these matters, while there may be some domestic legislation that might be affected—I am not familiar with it, if there is.

I think that as I said earlier, that all of these conventions would affect the relations of the United States in relation to the powers of other sovereign powers, and would not affect the relationship as between the United States and the several States.

Conventions on the Law of the Sea: Hearings on Executives J, K, L, M, N Before the Comm. on Foreign Relations, 86th Cong., 2d Sess. 75 (1960). Although Mr. Dean's statements are not wholly unequivocal, they do clearly indicate that it was not the intent of our delegation to affect the domestic legislation of the United States, either state or federal. Moreover, when the State Department was posed the same question by the Senate Committee, it responded, "It does not appear that any of the convention provisions conflict with existing legislation. It does appear that some supplementary and new implementing legislation

may be necessary or desirable." *Id.* at 92. We think these statements weigh against a self-executing interpretation of article 6.

Practically every observation we have made thus far concerning article 6 of the Convention on the High Seas and its effect if self-executing stands in stark contrast to the liquor treaty construed to be self-executing in *Cook*, the Convention for the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, United States-Great Britain, 43 Stat. 1761. First, the liquor treaty with Great Britain was bilateral and established mutual rights and obligations. The United States was granted the privilege of boarding any British vessel within one hour's sailing distance of the coast for the purpose of examining the vessel's manifest. If reasonable grounds for suspecting that she was smuggling liquor arose the vessel could be searched, and, if reasonable cause arose to believe that the vessel was engaged in such activity the vessel could be seized and subjected to adjudication by the courts of the United States. These rights were narrowly circumscribed by the limitation that they be exercised within one hour's sailing distance only.[33] On the other hand, Great Britain was insured that

[33] The relevant provisions of the treaty are displayed below.

Article II.

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories

the United States would not penalize British vessels that brought liquor into United States waters under seal in certain specified circumstances, *id.* art. 3, thus reversing the Supreme Court's opinion in *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 43 S.Ct. 504, 67 L.Ed. 894 (1923), which had held that the National Prohibition Act prohibited foreign vessels from bringing liquors into United States territory or territorial waters even if under seal and not for delivery in the United States.[34] As Masterson notes,

> The desire of the United States Government to break up the "rum-row" with the aid of far-reaching treaties, and the desire of foreign governments that their vessels be permitted to enter the ports and waters of the United States with alcoholic beverages under seal on board, presented an opportunity for a bargain, for

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or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, which shall determine the distance from the coast at which the right under this article can be exercised.

43 Stat. 1761-62.

[34] This provision was obviously intended to be self-executing. "There was little difficulty in concluding that Article III of the treaties, which provided that no forfeiture or penalty should attach the transportation of sealed liquors in American waters was self-executing. In other words, no legislation was required to give it effect. The treaty *ipso jure* superseded and repealed so much of the prohibition acts as was inconsistent therewith." P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 300-01 (1927) (footnote omitted).

> which all parties were unquestionably eager. Public sentiment in Great Britain against the decision in *Cunard v. Mellon* and the indignation in the United States over the conditions that existed off the coasts induced the representatives of both countries to renew their negotiations for a treaty in 1923, which had been begun in 1922.

W. Masterson, *Jurisdiction in Marginal Seas* 335-36 (1929) (footnote omitted); *accord, United States v. Ford,* 273 U.S. 593, 609-10, 47 S.Ct. 531, 536, 71 L.Ed. 793 (1927). Article 4 of the treaty established a mechanism for settling claims by British vessels that suffered loss from the improper exercise of the powers granted the United States under the treaty. As we noted above, article 6 of the High Seas Convention is a provision of a multilateral treaty, and it imposes no reciprocal obligations upon nations where it could not have self-executing effect. See note 24 *supra* and accompanying text.

Second, the liquor treaty addressed the specific problem of liquor smuggling. Its operation is strictly limited to that concern. Therefore, a self-executing interpretation would affect the jurisdiction of the United States only as regards seizures of British vessels engaged in smuggling liquor; the extraterritorial jurisdiction of the United States remained otherwise unaffected. Article 6, however, is a sweeping prohibition on the exercise of jurisdiction against foreign vessels on the high seas. A self-executing interpretation would therefore impinge upon the operation and enforcement of any law sought to be applied.

Third, as the Court was eager to point out in *Cook,* the Secretary of State had expressed the view that "in a strict sense the Treaty was self-executing." 288 U.S. at 119 & n.19, 53 S.Ct. at 311. The views of the State Department carry substantial weight in these matters, *see Factor v. Laubenheimer,* 290 U.S. 276, 295, 54 S.Ct. 191, 196, 78

L.Ed. 315 (1933); *Charlton* v. *Kelly*, 229 U.S. 447, 468, 33 S.Ct. 945, 952, 57 L.Ed. 1274 (1913), and it is therefore difficult to speculate as to the outcome of the case if no such opinion had been available to the Court. Here, both the chairman of the United States delegation to the 1958 Law of the Sea Conference and the State Department were of the view that the conventions do not affect domestic law.

Fourth, the liquor treaty was occasioned not so much by a concern on the part of the United States about the validity of seizures beyond the three-mile limit but by a desire to avoid the repeated protests that the British had lodged against such seizures. W. Masterson, *supra*, at 304-05, 326. Indeed, article 2 of the treaty begins with the following phrase, "His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of the territorial waters by the authorities of the United States . . . ." See note 32 *supra*. The British were staunch in their opinion that boardings and seizures beyond three miles for the enforcement of any domestic law were not justified. W. Masterson, *supra*, at 331-33 & n. 6. It was absolutely clear, therefore, that the British position was that any interference not justified by the treaty would be unacceptable and subject to protest. Therefore, it was assumed that Great Britain would assert the rights of its vessels and their crews under international law not to be subjected to adjudication. Without such objection, the doctrine embodied in the *Ker* case would apparently have validated the jurisdiction of the court notwithstanding the violation of international law. *See The Adela*, 73 U.S. (6 Wall.) 266, 18 L.Ed. 821 (1867); *cf. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.) (failure to object "would seem to preclude any violation of international law which might otherwise have occurred"), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975). The circumstances here are quite different. It may well be that a signatory to the High Seas

convention would not object to the seizure of one of its vessels on the high seas. That is apparently the case here because the record does not indicate that a protest was made to the seizure of the *La Rosa* or to the subjection of its crew to the jurisdiction of the district court below. It might well be that by not so objecting, the Grand Caymans intended to acquiesce. *See Lujan v. Gengler*, 510 F.2d at 67. A self-executing interpretation of article 6 would establish a defense to the jurisdiction of the United States in every case because its prohibition would be as authoritative as a statute of Congress depriving the United States courts of jurisdiction where seizure is effected in violation of the article. The executory interpretation we approve today leaves to the injured state the option of deciding whether it wishes to object. As we recently intimated in *United States v. Cadena*, 585 F.2d 1252, 1261 (5th Cir. 1978), "The violation of international law . . may be redressed by other remedies and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct."

[8, 9] In sum, we do not believe that the United States intended to limit its traditionally asserted jurisdiction over foreign vessels on the high seas by adopting article 6 of the High Seas Convention. The determination of this intent must be the touchstone of our interpretation. Moreover, we think the liquor treaty held to be self-executing in *Cook* wholly distinguishable.[35] We hold, therefore, that article 6

[35] We are well aware of the suggestion in *United States v. Cadena*, 585 F.2d at 1260 & n. 17, that the reasoning of the *Cook* case regarding the liquor treaty is equally applicable to article 22 of the Convention on the High Seas and therefore that it would supersede prior domestic legislation. We are not bound by this language for two reasons. First, the passage is clearly obiter dictum because the court held that the defendants could not avail themselves of the prohibition of article 22 since the nation under whose flag they had sailed had not ratified the Convention on the High

is not self-executing and that, by virtue of the *Ker-Frisbie* doctrine, the defendants cannot rely upon a mere violation of international law as a defense to the court's jurisdiction.

C. *Additional Issues*

The defendants allege numerous additional points of error. Rather than attempt to catalog them now, we address them as we present them below.

1. *The Coast Guard's Authority*

[10] The defendants contend that the Coast Guard lacks statutory authority to act against foreign vessels on the high seas beyond the twelve-mile limit.[36] This argument was squarely rejected by our recent decision in *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). There we held that 14 U.S.C. § 89(a) (1976) authorized the seizure of a foreign vessel some 200 miles at sea and the arrest of its crew. *Id.* at 1259. Section 89(a) empowers the Coast Guard to

> make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction,

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Seas. See note 8 *supra*. Second, even if the court's dictum were authoritative, it is addressed to article 22 and not article 6, the provision of concern to us. We expressly determined above that article 22 was not breached here. A treaty need not be wholly self-executing or wholly executory. *See, e.g.*, P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 300-01 (1927). Therefore, a self-executing interpretation of article 22 would not necessarily call for a similar interpretation of article 6.

[36] For a discussion of the Coast Guard's authority for the first boarding, see note 15 *supra*.

> or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

In *Cadena* we held that vessels become "subject to the jurisdiction, or to the operation of any law, of the United States" within the meaning of section 89(a) if they are engaged in a conspiracy to violate federal narcotics statutes. 585 F.2d at 1259. Here there was probable cause to believe the defendants were conspiring to smuggle contraband, and therefore the second boarding and seizure of the *La Rosa* and the defendants' arrests were authorized by section 89(a).

[11-13] The defendants make a related argument concerning the authority of the Coast Guard in effecting the boarding of the *La Rosa* beyond the twelve-mile limit. They claim that customs regulations invalidate boardings of foreign vessels in violation of treaty obligations of the United States.[37] This argument may be dismissed on alternative grounds, first, under the *Ker-Frisbie* doctrine the lack of authority of an arresting officer does not affect the jurisdiction of the court. Moreover, a lack of such authority

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[37] The relevant regulation is found in 19 C.F.R. § 162.3(a) (1978), which provides in pertinent part as follows:

> (a) *General Authority.* A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:
>
> . . . . . .
>
> (3) Any vessel within a Customs Enforcement area designated under such provisions of the Anti-Smuggling Act (19 U.S.C. §§ 1701-11) but Customs officers shall not board a foreign vesel upon the high seas in contravention of any Treaty with a foreign government or in absence of a special arrangement with the foreign government concerned.

is not of constitutional magnitude and therefore would be inappropriate occasion for invoking the exclusionary rule. *See United States v. Cadena*, 585 F.2d at 1264 & n.28. Second, since the Coast Guard boarded the *La Rosa* under the authority of section 89, it is immune from regulations infringing the plenary authority granted by this section. Although section 89(b) subjects the Coast Guard officers to customs regulations, section 89(c) provides that "[t]he provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States." In *United States v. Warren*, 578 F.2d 1058, 1068 (5th Cir. 1978) (en banc), we held that section 89(c) was "intended to give the Coast Guard the broadest authority available under law" and therefore interdicted any contrary regulations. We find *Warren* controlling here.

2. *Jurisdiction Over The Crime*

[14, 15] The defendants urge that the United States lacked competence to prescribe rules making their conduct on the high seas criminal. A necessary condition to the competence of a state to enforce its laws is that it have capacity to prescribe them. *Restatement (Second) of Foreign Relations Law of the United States* § 7(2) (1965). The United States has long adhered to the objective principle of territorial jurisdiction, which holds that it has jurisdiction to attach criminal consequences to extraterritorial acts that are intended to have effect in the United States,[38] at least where overt acts within the United States can be proved. *Ford v. United States*, 273 U.S. 593, 620, 47 S.Ct. 531, 540, 71 L.Ed. 793 (1927); *United States v. Cadena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978); *United States v. Winter*, 509 F.2d 975, 981 (5th Cir.), *cert. denied*

[38] That the defendants intended effects within the United States is established below in part II. 6.

sub nom. Parks v. United States, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); *Rivard v. United States*, 375 F.2d 882, 886 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884, 88 S.Ct. 151, 19 L.Ed.2d 181 (1967); *cf. Strassheim v. Daily*, 221 U.S. 280, 284-85, 31 S.Ct. 558, 560, 55 L.Ed. 735 (1911) (interstate extradition). The United States has exercised this competence in enacting the statutes under which the defendants were convicted, 21 U.S.C. §§ 846, 963 (1976), which prohibit conspiracies to distribute and import controlled substances. Implicit in these prohibitions, taken together, is that they apply extraterritorially. *See United States v. Bowman*, 260 U.S. 94, 98, 43 S.Ct. 39, 41, 67 L.Ed. 149 (1922); *Brulay v. United States*, 383 F.2d 345, 349-50 (9th Cir.), *cert. denied*, 389 U.S. 986, 88 S.Ct. 469, 19 L.Ed.2d 478 (1967). As we said in *United States v. Cadena*, 585 F.2d at 1259, "Congress intended that [21 U.S.C. § 963] apply to persons who commit[ted] acts or a series of acts that at least commenced outside the territorial limits of the United States." Therefore, if an overt act committed within the United States was proved by the Government,[39] the defendants fall within the proscriptions of sections 846 and 963.

[16] The record indicates that defendant Chitty directed the outfitting of the *La Rosa* in Fort Lauderdale, Florida, in late June 1976. Record, vol. 2, at 18-22. Payment was

[39] We do not intend to imply that an overt act within the United States is a necessary condition to the application of § 963. That section does not expressly require that an overt act be proved, and it is now the settled law of this circuit that it is not necessary that one be proved. *United States v. Johnson*, 575 F.2d 1347, 1366 (5th Cir. 1978); *United States v. Littrell*, 574 F.2d 828, 832 (5th Cir. 1978); *United States v. Thomas*, 567 F.2d 638, 641 (5th Cir. 1978). This result may well lead to the conclusion that the proof of an overt act within the United States is no longer required for jurisdictional purposes and that mere proof of intended territorial effects is sufficient. We need not, however, resolve this issue because we find that an overt act was proved to have occurred in the United States.

tendered in Fort Lauderdale, *id.* at 22-25, and approximately $21,000 of the $153,000 purchase price was paid by Chitty in cash, *id.* at 22-23.[40] The record further indicates that the *La Rosa* was delivered in Bimini on July 3, *id.* at 25, and that Postal and Chitty flew to Bimini on that date, *id.*, vol. 3, at 110. The *La Rosa's* logbook, which was introduced into evidence at trial,[41] shows that she left Bimini

[40] The *La Rosa* was purchased by Summerland Corp., which was stipulated by the Government to be a validly formed and registered Grand Cayman corporation. Record, vol. 3, at 9.

[41] The defendants objected to the admission of the logbook on the ground that it was hearsay. Although it is not clear who authored the logbook (it appears to have been kept by more than one of those on board the *La Rosa*) we think it inescapable that one of the crew of the *La Rosa* did so. There is no doubt that the logbook was that of the *La Rosa* because it was the only such book found, and its fixes corresponded closely to notations on charts also found on board. Record, vol. 3, at 97. Moreover, one of the final entries indicated a time and course corresponding closely to that of the *La Rosa* while it was under surveillance by the Coast Guard. *Id.*, vol. 2, at 62-63.

Under these circumstances the logbook was properly admissible as a declaration of a coconspirator during and in furtherance of the conspiracy under Fed.R.Evid. 801(d)(2)(E). We do not, in making this determination, assume the conclusion we are seeking to reach—that a conspiracy existed when the boat was purchased—because it is not necessary that the conspiracy upon which admissibility of the statement is predicated be that charged. Moreover, the agreement need not be criminal in nature. These observations are borne out by the legislative history of rule 801(d)(2)(E). "While [this] rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged." S.Rep.No.93-1277, 93d Cong., 2d Sess. 24, *reprinted* in [1974] U.S. Code Cong. & Admin. News, pp. 7051, 7073. It is clear to us that the voyage was a "joint venture" in and of itself apart from the illegality of its purpose and that the logbook was therefore admissible as nonhearsay under the rule.

on or about July 4. *Id.* at 78. She then sailed to South America where the marijuana was presumably obtained, and then she returned, arriving back off the Bahamas on September 13.[42] She continued southwesterly toward Miami and then along the Florida Keys where she was boarded and seized by the Coast Guard on September 15.

[17] The indictment against the defendants charges the purchase of the *La Rosa* in Fort Lauderdale as an overt act under both conspiracy counts. The defendants contend that the Government did not prove that a conspiracy existed among them at the time of the purchase of the *La Rosa* and therefore that the act of purchasing her cannot constitute an act in furtherance of the conspiracy. *See United States v. Easom*, 569 F.2d 457, 459 (8th Cir. 1978). We think the evidence in the record, although circumstantial, is sufficient to support a finding that a conspiracy existed when the *La Rosa* was purchased.

The defendants set sail for South America within a day of the delivery of the *La Rosa* in Bimini. Within ten weeks

[42] The log and charts found aboard the *La Rosa* indicate that she proceeded southeasterly from Bimini along the northern coasts of the Dominican Republic and Puerto Rico and then entered the Caribbean. She continued southward along the Leeward Islands, and she anchored at Martinique on July 29. Record, vol. 3, at 103. After approximately two weeks, she set sail, heading southward along the Leeward Islands. She then changed to a westerly course, which took her near Bonaire, off the coast of Venezuela. She sailed as far west as Riohacha, Colombia, on August 19. She then reversed her course and arrived on August 24 in Aruba, an event occasioned by the remark in the logbook "Were [*sic*] there!"

Several pages of the log that had been jettisoned when the *La Rosa* was approached by the Coast Guard are missing at this point, but it appears that she left Orangestad, Saint Eustatius, on August 25 and arrived just east of Great Isaac, Bahamas, on September 13. From there she sailed southwesterly until she was seized by the *Cape York* on September 15. The last entry noted is at 1:10 p.m. on that date, a time between the first and second boardings.

she returned to the Bahamas with some four tons of marijuana on board. Construing the evidence in the light most favorable to the Government and indulging all reasonable inferences in its favor, *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 567, 86 L.Ed. 680 (1942); *United States v. Alonzo,* 571 F.2d 1384, 1387 (5th Cir. 1978), we find this evidence sufficient to eliminate every reasonable hypothesis that the conspiracy had not been formed at the time the *La Rosa* was purchased. *See United States v. Bobo,* 586 F.2d 355, 368-69 (5th Cir. 1978). The only conceivable hypothesis that the *La Rosa* was purchased for innocent purposes is that the cruise to South America was not originally undertaken to obtain the marijuana but that the opportunity unexpectedly presented itself. Given the magnitude of the enterprise and the deliberateness with which it was carried out, we do not believe the reasonableness of this hypothesis is compelled as a matter of law. We therefore hold that the court below had jurisdiction over the conspiracies charged against the defendants.

3. *The Miranda Contentions*

[18] The defendants argue that *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 604 (1966), was violated in several instances. First, they claim that they were entitled to receive *Miranda* warnings from CPO Lewis when first boarded because that boarding created a custodial situation. *See id.* at 444, 86 S.Ct. at 1612. This boarding was a routine boarding under the well-established maritime doctrine of right of approach, and was intended merely to ascertain the nationality of the *La Rosa.* Indeed, when the task was accomplished, CPO Lewis, who had boarded alone, was recalled to the *Cape York.* This circuit, sitting en banc, recently held that a routine Coast Guard boarding does not in and of itself create a custodial situation calling for the reading of *Miranda* rights. *United States v. Warren,* 578 F.2d 1058, 1070 (5th Cir. 1978) (en banc). Moreover, nothing that CPO Lewis did after he boarded required that

he give the warnings. Postal's statement "Can you be bought?" was apparently volunteered without any prompting on the part of CPO Lewis, who had merely asked to see the *La Rosa's* papers. Therefore, we find *Warren* controlling here.

[19] Second, it is argued that the statements made by the defendants to Lt. Beardsworth and Chief Gaskill aboard the *Cape York* after their arrest were barred by *Miranda.* By this time the defendants had been read their rights twice—once on board the *La Rosa* by CPO Lewis upon the second boarding and again by Lt. Beardsworth when the defendants were brought aboard the *Cape York.* The unrefuted testimony of Chief Gaskill was that the statements were volunteered and that he asked absolutely no questions of any of the defendants during the period when they uttered the incriminating statements. Record, vol. 3, at 247. *Miranda,* by its own terms, does not exclude such statements: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478, 86 S.Ct. at 1630; *United States v. Garcia-Godos,* 541 F.2d 1123 (5th Cir. 1976) (per curiam) (voluntary post-*Miranda*-warning statements admissible). Similarly, the record does not indicate that the statement made by Postal to Lt. Beardsworth that the *La Rosa* was low on fuel was anything but voluntary. Therefore, we hold the defendants' statements not to have been admitted in violation of *Miranda.*

4. *The Bruton Issue*

The defendants question the admissibility of their post-arrest statements against those not uttering them on the dual basis that they are hearsay and violative of *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which holds that one codefendant's confession implicating another is inadmissible if the confessor refuses to

testify. Since we find these statements properly admissible for nonhearsay purposes, we find that their admission did not contravene *Bruton*.

[20] We start with the observation that the postarrest utterances of coconspirators do not qualify as nonhearsay under Fed.R. Evid. 801(d)(2)(E), which removes from the realm of hearsay statements made by a coconspirator during and in furtherance of the conspiracy. A coconspirator's participation in a conspiracy ends with his arrest, and therefore his postarrest statements are not made during the course of the conspiracy. *United States v. Arias-Diaz*, 497 F.2d 165, 171 (5th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975). *See United States v. Warren*, 578 F.2d at 1058. It does not follow, however, that because a coconspirator statement does not come within rule 801(d)(2)(E) it is inadmissible for any purpose. The statement may be probative of an issue at trial apart from the truth or falsity of its contents, and if so it may be admissible as nonhearsay because it is not offered to prove the truth of the matter asserted. *See* Fed.R.Evid. 801(c). We think the postarrest statements made here are of substantial probity with respect to several significant issues regardless of whether the matters they assert are in fact true.

[21] The questioned statements include that of Chitty made to Chief Gaskill, "We made a mistake by throwing the papers overboard and not—laying [*sic*] offshore until a pickup." Also contested is the statement attributed by Gaskill to both Postal and Forsythe, "It was to be an $80,000—one-time shot for $80,000." Finally, the defendants dispute the admissibility of the statement made by Postal to Lt. Beardsworth that the *La Rosa* was low on fuel. We shall take up the statements made to Gaskill first.

Chitty's statement is highly probative of a crucial issue in the case, the intent of the defendants to import the marijuana into the United States. This is an essential element of

the crime under 21 U.S.C. § 963 (1976). The statement is probative independent of the truth-value of the matter asserted. It is irrelevant whether in fact boats were coming to pick up the marijuana from the *La Rosa* while she hovered beyond the twelve-mile limit. The probity of the statement derives wholly from the fact that Chitty *thought* that they were, thereby tending to show that he intended that the marijuana be introduced into the United States. By the same reasoning, the utterance is probative of the defendants' intent to distribute the marijuana, an element of the conspiracy charged under 21 U.S.C. § 846 (1976). Moreover, the mere fact that he made the statement is relevant to the issues of Chitty's knowledge of the conspiracy and his participation in it. *Cf. United States v. Bobo*, 586 F.2d 355, 371-72 (5th Cir. 1978).

Similarly, the statements of Postal and Forsythe made to each other in the presence of Chief Gaskill tend to prove their participation in the conspiracy and their knowledge of it, wholly apart from whether the "deal" was in fact "one-shot" or "for $80,000." The relevance of the assertions derives from their shared conception that the cruise was designed to accomplish that end. These statements, like Chitty's, are probative of the defendants' intent to distribute the marijuana.

Postal's statement to Lt. Beardsworth has nonhearsay significance because the termination of the voyage in the United States would be a probable consequence of Postal's belief—whether well-founded or not—that the *La Rosa* was low on fuel. That Postal thought the *La Rosa* was low on fuel was clearly inconsistent with his statement that the *La Rosa* was en route to Belize. For these reasons, we find the statements admissible for nonhearsay purposes.

We now turn to the *Bruton* problem, which evaporates by virtue of our conclusion that the statements are admissible for nonhearsay purposes. *Bruton* concerned a postarrest *confession* of one codefendant sought to be intro-

duced against the other. Confessions characteristically have little, if any, probative value for purposes other than the truth of the matter asserted in them, and therefore they generally fall within the heartland of hearsay. It is precisely the inability of a codefendant effectively to dispute the truth of a confession that led the court in *Bruton* to hold its introduction violative of the confrontation clause. 391 U.S. at 136 & n.12, 58 S.Ct. at 1628. But when the statement has probity independent of its truth, to that extent there is no confrontation issue. The only question is whether the declarant in fact uttered the statement, and the witness who relates the statement is fully subject to all the rigors of cross-examination.

> [A defendant is] not deprived of any right of confrontation on the issue of whether [the codefendant] actually made the statement related by [the witness]. Neither a hearsay nor a confrontation question would arise had [the witness's] testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.

Dutton v. Evans, 400 U.S. 74, 88, 91 S.Ct. 210, 219, 27 L.Ed. 2d 213 (1970) (footnote omitted). We find no *Bruton* error here.

5. *The Fourth Amendment Issues*

[22] As we noted above, see note 15, the initial boarding of the *La Rosa*, occurring within the twelve-mile limit, was authorized by 19 U.S.C. § 1581(a) (1976) and 19 C.F.R.

§ 162.3(a)(1) (1978).[43] These provisions authorize routine documentary checks without probable cause or articulable suspicion, and they apply equally to foreign and domestic vessels. *United States v. Freeman*, 579 F.2d 942, 945 (5th Cir. 1978); *cf. United States v. Warren*, 578 F.2d 1058, 1067-60 (5th Cir. 1978) (en banc) (construing analogous provisions in 14 U.S.C. § 89(a) (1976)). In *Freeman* we analyzed the fourth amendment ramifications of section 1581(a) and concluded that boardings pursuant to its provisions for the purpose of making documentary checks are both "statutorily authorized and constitutionally permissible." 579 F.2d at 947. Therefore, we find the first boarding constitutionally unimpeachable.

[23] A concomitant to the prerogative to board is the authority, indeed the duty, to act upon suspicions aroused during the boarding. *Id.* at 947-48. As we said in *Warren*, "[i]f during the course of such an inspection, circumstances arise that generate probable cause to believe that a violation of United States law has occurred, the Coast Guard may conduct searches, seize evidence, and make arrests." 578 F.2d at

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[43] The pertinent part of § 1581(a) states as follows:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

The relevant provisions of 19 C.F.R. § 162.3(a)(1) are:

> *Boarding and Search of Vessels*
>
> (a) *General Authority.* A Customs Officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vessel, may at any time go on board: (1) Any vessel within the Customs waters of the United States

1065 (citing *United States v. Odom*, 526 F.2d 339, 342 (5th Cir. 1976)). We think it abundantly clear that probable cause to believe that a crime was being perpetrated or contemplated by the defendants arose on the first boarding and wholly as a result of the legitimate exercise of Coast Guard authority.

The most telling circumstance supporting this conclusion is, of course, the statement made by Postal during the first board asking CPO Lewis if he could be bought. There are other facts as well: Postal refused to allow the initial boarding; the *La Rosa* maneuvered so as to make the boarding difficult; the logbook pages showing positions in South America were thrown overboard; the *La Rosa's* hatches, which had been open prior to the first boarding, were closed when CPO Lewis went aboard; and the *La Rosa* changed course after the first boarding to a heading taking her out of United States Customs waters. The district judge expressly found probable cause for the second boarding, Record, vol. 2, at 335, and we think these circumstances were more than ample to create probable cause and therefore provide constitutional pustification for the second boarding and the seizure of the *La Rosa*. *United States v. Weinrich*, 586 F.2d 481, 492 (5th Cir. 1978); *United States v. Cadena*, 585 F.2d 1252, 1263 (5th Cir. 1978). Certainly the trial judge's finding was not clearly erroneous; therefore, it stands. *Campbell v. United States*, 373 U.S. 487, 493, 83 S.Ct. 1356, 1360, 10 L.Ed.2d 501 (1963).

[24] We think the search of the *La Rosa* following the defendants' arrest well within constitutional limits because it was consented to by Forsythe. The record indicates that Forsythe opened the hatch of his own accord, revealing the marijuana. Record, vol. 3, at 205. Considering all the circumstances as we must, *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973), we find the search consensual. Forsythe had been given *Miranda*

warnings at this point,[44] and although he had been arrested there is absolutely nothing in the record to support the inference that the search was coerced in any way. "[T]he fact of custody alone has never been enough to demonstrate a coerced confession or consent to search." *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976); *accord, United States v. Hall*, 565 F.2d 917, 920 (5th Cir. 1978). We think the validity of this search follows a fortiori from the search upheld in *Hall*,[45] where the defendant had been arrested but no *Miranda* warnings had been given:

> In sum there is no evidence in the record of any intimidation, physical or physical abuse, or threats tending to invalidate the consent. The absence of a *Miranda* warning prior to the search is only one factor in assessing voluntariness. In light of the surrounding facts and circumstances, we are convinced that the consent was voluntary.

Id at 921; *see United States v. Villarreal*, 565 F.2d 932, 937 (5th Cir. 1978).

We hold, therefore, that the first boarding was valid even without articulable suspicion as a documentary inquiry sanctioned by international custom and domestic legislation. The second boarding and seizure was premised on probable cause, and the search that ensued was consensual. We find no fourth amendment infirmity.

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[44] Of course, *Miranda* warnings are not a prerequisite to the admissibility of physical evidence. *United States v. Warren*, 578 F.2d at 1072, but their recitation has been found to be a factor in favor of voluntariness. *See United States v. Watson*, 423 U.S. 411, 425, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976).

[45] Here, as in *Hall*, the defendants claimed to have been intoxicated and thus incapable of voluntary consent. "[I]ntoxication is a factor to consider, but that fact alone is not sufficient to undermine [their] consent." 565 F.2d at 921.

6. *Sufficiency of the Evidence*

[25] The defendants' attack on the sufficiency of the evidence is addressed to the importation element of the conspiracy charged under 21 U.S.C. § 963 (1976). We think the evidence adduced at trial amply demonstrates that the defendants intended to import the marijuana seized on board the *La Rosa*. According to the testimony of Chief Gaskill, Chitty stated that they, the defendants, had made a mistake in not waiting beyond the twelve-mile limit until the pickup boats had come. This statement, whether true or not, unequivocally demonstrates that it was the understood objective of the conspiracy to introduce the marijuana into the United States and to sell it there. Postal stated to Lt. Beardsworth that the *La Rosa* was low on fuel, and Forsythe answered no to CPO Lewis's question whether the defendants were really going to Belize. These statements as well tend to prove, independently of the truth of the matters they assert, that the defendants intended to import the marijuana. One additional fact of relevance is a statement in the *La Rosa*'s logbook,[46] made the day before she was sighted by the *Cape York*. The statement reads as follows: "32 hours and 95 miles to go." Record, vol. 3, at 82. It was the testimony as an expert, that, given the time the entry was made and the position and course indicated, ninety-five miles would have put the *La Rosa* at American Shoal, near Key West. *Id.* at 92. Reviewing all these facts in the light most favorable to the Government, we find them more than sufficient to support the finding beyond a reasonable doubt that the defendants intended to import the marijuana.

[46] The logbook was admissible to prove the truth of the matters it asserts because, as we indicated above, it is a statement of a coconspirator made during and in furtherance of the conspiracy. See note 41 *supra*.

III. Conclusion

We have carefully considered the defendants' additional contentions of error and find them to be wholly without merit. For this reason and for the others stated above we affirm the defendants' convictions.

Affirmed.

APPENDIX B

Annex II [1]

Convention On The High Seas

The States Parties to this Convention,

Desiring to codify the rules of international law relating to the high seas,

Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law,

Have agreed as follows:

Article 1

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

[1] The text of the convention printed herein constituted Annex II to the Final Act of the United National Conference on the Law of the Sea, which was certified by the Legal Counsel, for the Secretary-General of the United Nations. [Footnote added by the Department of State.]

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 3

1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter and in conformity with existing international convention accord:

(*a*) To the State having no sea coast, on a basis of reciprocity, free transit through their territory; and

(*b*) To ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.

2. States situated between the sea and a State having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions.

Article 4

Every State, whether coastal or not, has the right to sail ships under its flag on the high seas.

Article 5

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.

There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and socal matters over ships flying its flag.

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 6

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Article 7

The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an inter-governmental organization flying the flag of the organization.

Article 8

1. Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

Article 9

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

Article 10

1. Every state shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to:

(*a*) The use of signals, the maintenance of communications and the prevention of collisions;

(*b*) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments;

(*c*) The construction, equipment and seaworthiness of ships.

2. In taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

Article 11

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to

pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

Article 12

1. Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,

(*a*) To render assistance to any person found at sea in danger of being lost;

(*b*) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(*c*) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

2. Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and—where circumstances so require—by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

Article 13

Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.

Article 14

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(*a*) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(*b*) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of volutary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has

been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Article 21

A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(*a*) That the ship is engaged in piracy; or

(*b*) That the ship is engaged in the slave trade; or

(*c*) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (*a*), (*b*) and (*c*) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such persuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territoial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(*a*) The provisions of paragraph 1 to 3 of this article shall apply *mutatis mutandis;*

(*b*) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

Article 24

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

Article 25

1. Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents.

Article 26

1. All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. When laying such cables or pipelines the State in question shall pay due regard to cables or pipelines already in position on the seabed. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

Article 27

Every State shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

Article 28

Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in paying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

Article 29

Every State shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline, shall be indemnified by theowner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

Article 30

The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.

Article 31

This Convention shall, until 31 October 1958, be open for signaure by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.

Article 32

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 33

This Convention shall be open for accession by any States belonging to any of the categories mentioned in article 31. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 34

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 35

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notifica-

tion in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article 36

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other States referred to in article 31:

(*a*) Of signatures to this Convention and of the deposit or instruments of ratification or accession, in accordance with articles 31, 32 and 33;

(*b*) Of the date on which this Convention will come into force, in accordance with article 34;

(c) Of requests for revision in accordance with article 35.

Article 37

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in article 31.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

14 U.S.C. § 89

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall beimmediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel or such merchandise, or both, shall be seized.

Supreme Court, U. S.
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No. 78-1714

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT M. POSTAL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MERVIN HAMBURG
JOHN F. DePUE
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a to 57a) is reported at 589 F. 2d 862.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1979. The petition for a writ of certiorari was not filed until May 14, 1979, and is thus substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the seizure of petitioners on the high seas, in violation of a treaty to which the United States is a signatory, divested the trial court of in personam jurisdiction.

2. Whether the Coast Guard had statutory authority to board petitioners' vessel and to arrest them on the high seas.

3. Whether the initial boarding by the Coast Guard of petitioners' vessel within customs waters of the United States violated the Fourth Amendment.

TREATY INVOLVED

Article 6 of the Convention on the High Seas[1] provides in pertinent part:

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

STATEMENT

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to import marijuana into the United States, in violation of 21 U.S.C. 963, and of conspiring to possess marijuana with

[1] 13 U.S.T. 2312, T.I.A.S. No. 5200, opened for signature April 29, 1958 (hereafter "High Seas Convention").

intent to distribute it, in violation of 21 U.S.C. 846. Petitioners Postal and Chitty were each sentenced to one year's imprisonment, and petitioner Forsythe was sentenced to nine months' imprisonment. Each sentence was to be followed by a four year term of special parole. The court of appeals affirmed (Pet. App. 1a-57a).

1. The evidence showed that during late June 1976, petitioner Chitty directed the outfitting of the *La Rosa*, a fifty-one foot pleasure sailing vessel, in Fort Lauderdale, Florida (Pet. App. 12a, 45a-46a). The vessel was purchased by a corporation registered in the Grand Cayman Islands, a territory of the United Kingdom, and Chitty, acting on behalf of the corporation, tendered approximately $21,000 of the $153,000 purchase price in Fort Lauderdale (*id.* at 7a, n.8, 46a). Thereafter, the *La Rosa* was delivered in Bimini on July 3, 1976, and Chitty and Postal flew to Bimini on that date. The vessel left Bimini on or about July 4, 1976, sailed to South America, and returned, arriving off the Bahamas on September 13, 1976. She then continued in a southwesterly direction, heading toward Miami (*id.* at 46a-47a).

On the morning of September 15, 1976, the Coast Guard cutter *Cape York* sighted the *La Rosa* approximately 8.5 nautical miles southeast of Upper Matecumbe Key, one of the Florida Keys. At that time the vessel, with all three petitioners aboard, displayed no flag and exhibited neither her name nor home port on her stern. Lieutenant Beardsworth, the commanding officer of the *Cape York*, approached to within 25 yards of the *La Rosa* and inquired as to her origin and destination. Two of the *La Rosa*'s crew held up a flag that was later identified as that of the Grand Cayman Islands, although at the time of the inquiry its identity was uncertain.

Petitioner Postal also stated that his crew was Australian, that the vessel was of Grand Cayman registry, and that they were en route from the Bahamas to Belize, British Honduras (Pet. App. 2a-3a).

After consulting with Coast Guard Headquarters in Miami, Florida, and repeating these inquires to the *La Rosa*'s crew, Beardsworth decided that the vessel should be boarded to verify her documentation papers. Accordingly, he ordered her to heave to and stand by for boarding. After Postal refused to permit the boarding, Beardsworth again consulted his superiors, who directed him to board the *La Rosa*. Postal agreed to receive one boarder (Pet. App. 3a).

The *La Rosa* then began to maneuver erratically, and papers were observed being jettisoned from the vessel. The documents were retrieved and later proved to be portions of the ship's log. Following these events, Chief Petty Officer Lewis boarded the vessel, which was then approximately 10.5 nautical miles from the United States coast. Postal agreed to show Lewis the *La Rosa*'s documents, but he refused to produce the crew's personal identifications (Pet. App. 3a-4a).

Before producing the documents, however, Postal asked Lewis whether he would accept a bribe. Lewis rejected the offer, but Postal repeated it, stating that he had been in the Coast Guard but had found a better way to make a living. Lewis again refused the offer. Lewis then remarked that the crew members were not Australian, as Postal had claimed, and several of them responded jokingly, "Why, don't we sound like them?" In addition, Lewis observed that the vessel's hatches, which had been open before the boarding, were closed and that Chitty was sitting on one of them (Pet. App. 4a).

Postal then produced documents showing that the *La Rosa* was registered in the Grand Cayman Islands. This information was relayed to Coast Guard Headquarters in Miami, which verified the registry, and Lewis returned to the *Cape York*. Upon his return, Lewis told Beardsworth of his experience and observations and expressed his belief that the vessel was transporting contraband (Pet. App. 4a-5a).

These additional facts were communicated to Coast Guard headquarters, which directed the *Cape York* to maintain surveillance. At this point, the *La Rosa* altered its course from one roughly parallel to the Florida coast to one running 35° away from it. Following further consultation with headquarters, Beardsworth decided to reboard the *La Rosa* to conduct a customs search, and the *Cape York* approached the vessel under a show of force. Lewis and two other armed Coast Guardsmen boarded the *La Rosa* the second time, approximately two and a half hours after the first boarding; the *La Rosa* was then about 16 miles from the nearest United States coastline (Pet. App. 5a).

Lewis discovered approximately 8,000 pounds of marijuana in the *La Rosa*'s hold and arrested petitioners, who, with their vessel, were then taken to Miami (Pet. App. 6a-7a).

2. Prior to trial, petitioners moved to dismiss the indictment and to suppress the evidence on the ground that the boardings and the seizure of the vessel violated international law and the Fourth Amendment (S. Tr. 13). The motions were denied (S. Tr. 337). On appeal petitioners reiterated the same claims (Pet. App. 11a-12a). The court of appeals held that the first boarding was permissible under international maritime law as an

exercise of the right of approach codified in Article 22 of the High Seas Convention,[2] because the Coast Guard reasonably suspected that the vessel was of United States registry (Pet. App. 13a).

The court of appeals further held, however, that "the second boarding of the *La Rosa*, * * * was in violation of Article 6 of the High Seas Convention [which accords exclusive jurisdiction over vessels on the high seas to the flag state] * * * because no treaty provision justifie[d] the second boarding or the ultimate seizure * * * " (Pet. App. 15a). It concluded, nonetheless, that the treaty violation did not divest the district court of jurisdiction over petitioners (*id.* at 18a-42a). The court also rejected petitioners' Fourth Amendment claims (*id.* at 52a-55a).

ARGUMENT

1. Petitioners contend (Pet. 4-12) that the trial court lacked jurisdiction over their persons because they were arrested in violation of Article 6 of the High Seas Convention. The court of appeals correctly rejected this contention.[3]

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[2]Article 22 of the High Seas Convention provides in pertinent part:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> * * * * *
>
> (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality of the same nationality as the warship.

[3]Although petitioners argued in the district court and the court of appeals that the violation of the High Seas Convention also required the suppression of evidence, they do not present that question for this Court's review. The contend here only that the treaty violation deprived the district court of jurisdiction.

It is well-established that the unlawful manner by which jurisdiction is acquired over a criminal defendant does not deprive a court of jurisdiction to try the defendant. *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). *Cook* v. *United States*, 288 U.S. 102 (1933), on which petitioners primarily rely, established a limited exception to that principle when it ordered the dismissal of an in rem action against a British liquor smuggling vessel that was seized in violation of a bilateral treaty between the United States and Great Britain dealing specifically with and limiting the authority of the United States to board, search, and seize British vessels suspected of smuggling alcoholic beverages into the United States. Whether the treaty violation in *Cook* would have required dismissal of a criminal action against the crew members was not considered or decided by the Court,[4] but, in any event, the court of appeals correctly concluded that the principal of *Cook* does not aid petitioners.

As the court of appeals held (Pet. App. 22a-24a), and as petitioners concede (Pet. 5-6), whether or not a treaty affects the domestic law of the United States, including the law concerning the jurisdiction of its courts, depends on whether the treaty provision at issue is self-executing or, on the other hand, is merely executory—*i.e.* requires

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[4]In our view it is doubtful that the Court in *Cook* would, for example, have required dismissal of the prosecution of a crew member charged with a murder committed in the United States merely on the basis of the treaty violation.

legislation in order to become part of the domestic law.[5] The question in this case and in *Cook* is not whether the terms of the treaties, standing alone, prohibited the seizures—in both cases they did—but whether the terms of the treaties, standing alone, divested the courts of the United States of jurisdictions in the proceeding. In *Cook*, this Court concluded that the provisions of the treaty with Great Britain, standing alone, served to deprive the courts of the United States of jurisdiction over the in rem action, because the treaty expressly stated that if a vessel were seized in accordance with its provisions, the "vessel may be seized and taken into a port of the United States, its territories or possessions *for adjudication in accordance with such laws.*" See *Cook, supra,* 288 U.S. at 111 (emphasis supplied). The Court concluded that, by that provision, the United States intended to withdraw the jurisdiction of its courts over vessels seized in violation of the treaty. In that respect the Court described the treaty provision as "self executing" (*id.* at 119). The Court stated (288 U.S. at 121-122):

> The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. * * * To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

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[5]For example, the fact that a treaty merely prohibits certain acts does not mean that a person committing those acts may be criminally prosecuted and punished in the absence of additional domestic legislation making the conduct criminal and establishing penalties for it. *The Over The Top,* 5 F. 2d 838, 845 (D. Conn. 1925). See generally, *Restatement (Second) of Foreign Relations Laws of the United States* §141 (1965).

The High Seas Convention contains no similar provision dealing with the jurisdiction of the courts of signatory nations to adjudicate offenses discovered as a result of violations of the Convention, and the court of appeals correctly held (Pet. App. 27a-42a) that nothing in the purpose or history of the Convention indicates an intent to affect such jurisdiction. In this case, accordingly, the general rules apply that the manner by which a person is seized does not affect the jurisdiction of a criminal court and that violations of international obligations embodied in international law or treaties are matters for the affected sovereigns to resolve, and they provide no enforceable rights on the part of individuals. See *The Richmond* v. *United States,* 13 U.S. (9 Cranch) 102, 103 (1815); *United States* v. *Cadena,* 585 F. 2d 1252, 1261 (5th Cir. 1978).[6]

2. Petitioners also claim (Pet. 11-12) that the Coast Guard lacked "constitutional and statutory authority" (Pet. 11) to seize and board their vessel because it was a pleasure craft and was sailing beyond the 12 mile customs enforcement zone at the time of the seizure. To the extent this argument is based on the violation of the High Seas Convention, we have discussed it in Point 1, *supra.* To the extent it is based on an alleged violation of statutory authority, it is incorrect. 14 U.S.C. 89(a) empowers the Coast Guard to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas

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[6]Contrary to petitioners' claim (Pet. 6-7), neither *United States* v. *One 43 Foot Sailing Vessel,* 405 F. Supp. 879 (S.D. Fla. 1975), aff'd, 538 F. 2d 694 (5th Cir. 1976), nor *United States* v. *Petrulla,* 457 F. Supp. 1367 (M.D. Fla. 1978), holds or suggests that the provisions of the High Seas Convention, standing alone, divest the courts of the United States of jurisdiction over persons seized in violation of the Convention.

and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." See *United States* v. *Cadena, supra,* 585 F. 2d at 1259, upholding the Coast Guard's statutory authority in a similar case.[7] Petitioners do not dispute that the events which preceded the boarding, particularly the vessel's evasive maneuvering to avoid the initial inspection, the jettisoning of the vessel's log, the captain's false responses concerning the nationality of the crew, and Postal's efforts to bribe Chief Petty Officer Lewis, provided abundant probable cause to believe petitioners were participants in conspiracy to violate the laws of the United States. In any event, as the court below noted (Pet. App. 43a), even if the Coast Guard had acted in excess of its statutory authority, that would not affect the court's jurisdiction over persons brought before it. *Frisbie* v. *Collins, supra,* 342 U.S. at 522.

3. Petitioners also contend (Pet. 12-16) that the initial boarding of the *La Rosa*, when it was 8.5 miles from the United States and thus within the customs waters of the United States, violated the Fourth Amendment because it was allegedly not based on reasonable suspicion. That claim is incorrect because neither the pertinent statutes nor the Fourth Amendment require any degree of

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[7]Petitioners attempt (Pet. 12) to distinguish *Cadena* on the ground that the vessel there was registered to a nation that had not yet ratified the High Seas Convention. But that fact would be relevant only to petitioner's argument that the Convention was violated here (which is not disputed) and that such a violation ousts the district court of jurisdiction (which we do dispute; see Point 1, *supra*). It is entirely irrelevant to the claim that petitioners' arrests were in excess of the Coast Guard's statutory authority.

suspicion before the Coast Guard may board a vessel in the customs waters of the United States in order to check its documents, and because in this case there was reasonable suspicion that the *La Rosa* was not properly registered.

19 U.S.C. 1581(a) and 19 C.F.R. 162.3(a)(1) specifically authorize Coast Guard and other customs officers to make documentary checks of foreign and domestic vessels within the customs waters of the United States without probable cause or articulable suspicion.[8] Such document inspections within this zone are reasonable and do not violate the Fourth Amendment. See, *e.g., United States* v. *Freeman,* 579 F. 2d 942, 946-947 (5th Cir. 1978); *United States* v. *Warren,* 578 F. 2d 1058, 1066 (5th Cir. 1978) (en banc); *United States* v. *Odom,* 526 F. 2d 339 (5th Cir. 1976). See also *United States* v. *Ramsey,* 431 U.S. 606, 616-617, 622 (1977); *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 884 (1975).

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[8]19 U.S.C. 1581 provides pertinently that customs officers (defined by 14 U.S.C. 89(b) to include Coast Guard petty officers)

> may at any time go on board any vessel * * * at any place * * * within the customs waters [defined by 19 U.S.C. 1401(j) as those waters within twelve miles of the Coast of the United States] * * * and examine the manifest and other documents and papers and examine, inspect, and search the vessel * * * and every part thereof and any person, trunk, package, or cargo on board.

The relevant portion of 19 C.F.R. 162.3(a)(1) provides:

> A Customs Officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go onboard: (1) Any vessel * * * within the Customs waters of the United States * * *.

Moreover, Lieutenant Beardsworth in fact had reasonable suspicion that the *La Rosa* was not properly registered, and petitioners' claim to the contrary (Pet. 14-15) is refuted by the record. Although, upon inquiry, the crew displayed the flag of the Grand Cayman Islands, the vessel was flying no flag when initially sighted and she exhibited neither her name nor home port on her stern. As the court below recognized (Pet. App. 13a), in view of the requirements imposed by most national shipping laws that vessels fly the flag of the state of their registry and bear their names to permit visual identification, there was abundant ground for suspecting the vessel lacked proper registry even after her crew displayed a Grand Caymans flag. Hence even if, notwithstanding the statutory authority of Section 1581(a), reasonable suspicion were required as a predicate for the inspection, the requirement was fully satisfied. See *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 884; see also *United States* v. *Ramsey, supra,* 431 U.S. at 614-615; *Adams* v. *Williams,* 407 U.S. 143, 145-146 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 27, 30 (1968); *United States* v. *Cortes,* 588 F. 2d 106, 110-111 (5th Cir. 1979).[9]

[9]Petitioners' reliance (Pet. 13) upon *Delaware* v. *Prouse,* No. 77-1571 (March 27, 1979), and *United States* v. *Brignoni-Ponce, supra,* is misplaced. In the first place, neither of these cases involved a stop within the statutorily-defined customs zone or the functional equivalent of a border. See *United States* v. *Freeman, supra,* 579 F. 2d at 946. In addition, in both these cases police lacked a reasonable suspicion that the occupants of the vehicles were violating the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MERVIN HAMBURG
JOHN F. DEPUE
Attorneys

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